90-5744 (2)

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

7th Circuit Case Nos.
89-3364, 89-3390, 89-3391

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QUESTIONS PRESENTED

1. Whether a carrier to which LSD is adhered for ease of delivery constitutes a "mixture or substance containing" LSD within the meaning of the federal sentencing guidelines and 21 U.S.C. sec. 841(b)(1)(B)(v), so that the weight of the carrier is included in the total weight that determines the guideline sentence and triggers mandatory minimum sentences.

If the first question is answered affirmatively, two constitutional questions are presented:

2. Whether a defendant has a fundamental right to substantive fairness in sentencing, requiring strict scrutiny of a claimed impairment of that right.

3. Whether basing sentences for LSD distribution upon the arbitrary weight of the LSD carrier violates a defendant's right to due process of law.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petition of Richard L. Chapman, John M. Schoenecker, and Patrick Brumm respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appelas for the Seventh Circuit, entered in the above-entitled proceedings on July 17, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at ___ F.2d ___ (7th Cir. 1990) and is reproduced in the appendix, page 1A, *infra*.

The memorandum decision of the United States District Court for the Western District of Wisconsin (Crabb, J.) has not been reported. It is reproduced in the appendix, page 26A, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was rendered on July 17, 1990, affirming petitioners' judgments of conviction entered on October 24, 1989. Jurisdiction was conferred upon the court of appeals generally by 28 U.S.C. sec. 1291 and specifically by 18 U.S.C. sec. 3742, authorizing appeals from sentences imposed after November 1, 1987 which are alleged to violate the law or to misapply the sentencing guidelines. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1) and Rule 20.1 of the Rules of the Supreme Court of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

21 U.S.C. sec. 841 provides in relevant part:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ...
>
> (b) Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> ...
>
> (1)(B) In the case of a violation of subsection (a) of this section involving --
>
> ...
>
> (v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
>
> ...
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years ...

Amendment V to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

An indictment filed May 3, 1989 charged each petitioner with distributing approximately five grams of LSD in violation of 21 U.S.C. sec. 841. Each petitioner entered a guilty plea.

Prior to sentencing, each defendant moved the court to declare the five year mandatory minimum sentencing provision of 21 U.S.C. sec. 841(b)(1)(B)(v), and the federal sentencing guidelines, unconstitutional as applied to LSD distribution. For the purpose of the motion, the government stipulated that LSD is sold by the dose, not by weight.

Federal sentencing guidelines base the approved sentencing range in LSD cases upon the gross weight of any "mixture or substance containing" the LSD. *United States v. Rose*, 881 F.2d 386 (7th Cir. 1989), construed the guidelines and sec. 841(b)(1)(B)(v) to include the blotter paper or other carrier to which LSD is adhered in the gross weight that determines guideline sentences. Petitioners contended that basing sentences upon the arbitrary weight of the LSD carrier produces irrational results and violates their right to due process of law. The court denied the motions. (*See* page 26A, *infra.*) Petitioner Chapman was sentenced to a 96 month prison term. Petitioner Schoenecker received a 63 month sentence. Petitioner Brumm was given the mandatory minimum five year sentence.

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit. After oral argument before a three judge panel, the court, on its own motion, ordered a rehearing *en*

banc. By a 6 to 5 vote, the court of appeals affirmed the trial court's ruling. Petitioners seek Supreme Court review of the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

Introduction

Congress and the sentencing commission have visited progressively harsher penalties upon drug retailers as they distribute larger quantities of controlled substances. As the amount (measured by weight) of the distributed substance increases, the corresponding penalties increase. Sufficiently large weights trigger mandatory minimum sentences.

Federal legislation and the sentencing guidelines generally require the weight of any inert substance mixed with the controlled substance to be included in the gross weight that determines the sentence. If cocaine is mixed or "cut" with quinine, for instance, the total weight of the mixture will determine the sentence. This is a reasonable approach to measuring culpability in the case of cocaine, because mixing cocaine with an inert substance allows the retailer to market the drug to a greater number of people. Since cocaine is sold by weight, adding to the weight of the cocaine adds to the retailer's profits.

This rationale for basing a sentence upon the total weight of a mixture containing a controlled substance loses its validity when applied to a drug that is not sold by weight. LSD is sold by the dose. To increase the convenience of delivery, doses of LSD are adhered to inert carriers. The carrier may be relatively heavy (e.g., a sugar cube) or relatively light (e.g., a gelatin

capsule). Regardless of the type or weight of the carrier, the strength, purity, and price of the dose will remain the same. The choice of the carrier, and the weight of any particular carrier, is arbitrary, without relevance to the dealer's culpability. It is the number of doses sold, not the weight of the carrier holding the doses, that measures an LSD retailer's success in the marketplace.

Yet the sentencing guidelines, and the statute creating mandatory minimum sentences in LSD cases, treat LSD as if it were, like cocaine, sold by weight. The statute and guidelines require sentences to be based upon the gross weight of any "mixture of substance containing" a detectable amount of LSD. These words were interpreted by the court below to include the inert carrier to which LSD is adhered. If the court's interpretation is correct, the dealer who sells one hundred doses of LSD on sugar cubes may receive a much longer sentence than a dealer with an identical criminal record who sells one thousand doses of LSD on a lighter carrier, such as gelatin capsules.

Counting the weight of the carrier requires courts to base sentences upon an arbitrary factor. The weight of a drug carrier is truly an irrelevant consideration when the drug is not sold by weight. When the arbitrary weight of a drug carrier is counted in the gross weight that determines the sentence, courts are forced to impose widely disparate sentences for identical conduct, based only upon the dealer's good or bad fortune in using a lighter or heavier carrier.

The majority and dissenting opinions in the court of appeals' decision agree that the statute and guidelines governing sentencing of defendants convicted of drug crimes may lead to unfair or "erratic" results when applied to LSD distributors. Nonetheless, the court declined to interpret the statute and guidelines in a way that would have avoided the problem, and found no constitutional infirmity in a sentencing scheme that assures arbitrary results.

The sharply divided court, sitting *en banc*, held that a defendant's right to due process of law does not protect the defendant from a sentencing scheme that compels judges to base sentences upon an arbitrary factor. A philosophical debate at the heart of constitutional law echoes through the majority and dissenting opinions: whether due process of law requires a governmentally imposed deprivation of life, liberty, or property to be substantively, as well as procedurally, fair. In a dissent unusual for its frank discussion of the conflicting judisprudential philosophies that inform the substantive due process debate, Judge Posner contrasted "the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatist's view that the practice of interpretation and the general terms of the Constitution (such as 'equal protection of the laws') authorize judges to enrich positive law with the moral values and practical concerns of civilized society." *United States v. Chapman*, No. 89-2420, slip

op. at 43 (7th Cir. July 17, 1990)(Posner, J., dissenting). Judge Posner noted that the positivist approach, "applied unflinchingly to this case, commands the affirmance of prison sentences that are exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment" while the natural law approach "leads to a freer interpretation, one influenced by norms of equal treatment ...." *Id.*

While no case is likely to provide a vehicle for the ultimate resolution of this debate, Supreme Court review of this case can at least advance the law by settling some troubling questions:

1. When a sentencing scheme requires a sentence to be based in part upon an arbitrary factor, compelling sentences that vary drastically when compared to other sentences imposed upon identically situated and equally culpable offenders, should the sentencing scheme be interpreted to avoid dependence upon the arbitrary factor?

2. Is fairness in sentencing a fundamental right, so that a claimed impairment of that right must be strictly scrutinized in determining whether the defendant's right to due process of law has been violated?

3. If the sentencing scheme is interpreted in a way that makes sentences hinge upon an arbitrary factor (i.e., the weight of the LSD carrier), does the sentencing scheme violate the defendant's right to due process of law?

The Supreme Court should grant review in this case to provide guidance both to lower courts confronting these recurring questions, and to legislatures and sentencing commissions in creating (or improving) sentencing schemes that address drugs that are not sold by weight.

I. THE WORDS "MIXTURE OR SUBSTANCE CONTAINING A DETECTABLE AMOUNT" OF LSD SHOULD BE CONSTRUED TO EXCLUDE THE CARRIER TO WHICH LSD IS ADHERED

The government stipulated that LSD is not sold by weight. Rather, it is sold by the dose, or "hit." A dose of LSD weighs about 0.05 milligrams. Because the dose is so small, it is typically adhered to a carrier prior to delivery to a retail consumer. The nature of the carrier is limited only by the retailer's imagination. Gelatin capsules and blotter paper appear to be the most common, but other substances have been employed, including sugar cubes and animal crackers. Committee Report, *Dependence on LSD and Other Hallucinogenic Drug*, 202 J. Am. Medical Asso. 47, 47 (October 2, 1967).

While the weight of a dose of LSD remains fixed, the weight of the carrier to which it is adhered will vary: sugar cubes weigh more than blotter paper, which weighs more than a gelatin capsule.[1] Since there are no "industry standards" for drug dealers, the weight of carriers of the same nature may vary from

[1]The 1,000 doses of LSD that were distributed in the *Chapman* case, together with the blotter paper to which they were adhered, weighed about 5.7 grams. An identical number of doses of LSD adhered to gelatin capsules weighed 2.25 grams in *United States v. McGeehan*, 824 F.2d 677, 680 (8th Cir. 1987).

retailer to retailer: some blotter papers, for instance, may be heavier than others.[2] All of this makes little difference to the consumer. So long as the LSD is delivered in some convenient form, it will not generally matter to the consumer whether the carrier consists of lighter blotter paper, heavier blotter paper, or gelatin capsules. The consumer is interested in buying, and the retailer is interested in selling, a specified number of doses of LSD. Neither party is likely to give much thought to the weight of the carrier that holds the LSD.[3]

The weight of the carrier is crucial, however, to the sentence imposed for the delivery. The sentencing statute imposes a five year mandatory minimum term of imprisonment for selling one gram or more of a "mixture or substance containing a detectable amount" of LSD. 21 U.S.C. sec. 841(b)(1)(B)(v). If blotter paper is a "mixture or substance containing" the LSD adhered to it, sales of relatively modest amounts of LSD will trigger the mandatory minimum sentence.

The sentencing guidelines track the language of sec.

[2]It appears, for instance, that blotter paper used by a defendant in a companion appeal to the *Chapman* case weighed substantially more than the blotter paper used by the *Chapman* defendants. *See Chapman*, slip op. at 4 n.1.

[3]Of course, if the *Chapman* decision remains the law, sophisticated dealers will begin to use the lightest carriers they can find. Deliveries of larger quantities may be made in liquid or crystallized form to avoid the carrier weight. Ironically, since lighter carriers are likely to be smaller and less detectable by law enforcement agencies, the *Chapman* decision may make the drug war in the realm of LSD less winnable by encouraging dealers to minimize the size, weight, and use of LSD carriers.

841(b)(1)(B)(v). The footnote to the Drug Quantity Table, sec. 2D1.1(c), **Federal Sentencing Guidelines**, states that "the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Thus, if the LSD carrier is treated as a mixture or substance containing LSD, a heavier carrier will place the defendant in a guideline range calling for a longer sentence.

Authority is in conflict as to whether an LSD carrier is a "mixture or substance containing" LSD withing the meaning of the statute and guidelines. Most courts addressing the issue have, without significant analysis, concluded that LSD carriers fall within the plain meaning of the words "mixture or substance containing" LSD.[1] Interestingly, while the Court of Appeals for the Seventh Circuit came to the same conclusion (although the issue was not raised or briefed by the defendant) in *United States v. Rose*, 881 F.2d 386 (7th Cir. 1989), the author of the *Rose* decision, dissenting in *Chapman*, changed his mind and adopted the view that LSD carriers are not included within the intended meaning of the words "mixture of substance containing" LSD. *Chapman*, slip op. at 43 (Posner, J., dissenting).

One court has agreed with the construction favored by the

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[1] *United States v. Taylor*, 868 F.2d 125 (5th Cir. 1989); *United States v. Elrod*, 898 F.2d 60 (6th Cir. 1990); *United States v. Bishop*, 894 F.2d 981 (8th Cir. 1990); *United States v. Larsen*, 904 F.2d 563 (10th Cir. 1990).

Chapman dissenters. *United States v. Healy*, 729 F. Supp. 140. (D.D.C. 1990), holds that LSD carriers are not a "mixture or substance containing" LSD. The *Healy* court's interpretation is supported both by the ordinary meanings of "mixture" and "substance" and by a common sense understanding of those words in the context of drug distribution. LSD is typically sprayed onto blotter paper in a solution of alcohol. When the alcohol dissolves, the LSD remains adhered to the paper. *Chapman*, slip op. at 3. Yet the LSD is no more a part of a "mixture" with the blotter paper than glue adhered to the back of a postage stamp is part of a "mixture" with the stamp.

Nor is it sensible to view an LSD carrier as a "substance containing" LSD. Although cocaine can be delivered in a glass jar, and although the glass jar is undeniably a "substance" which "contains" the cocaine, all agree that the weight of the jar is not to be counted in determining a sentence for cocaine distribution. When heroin is sold in a capsule, the weight of the capsule is not counted for the purpose of sentencing, even though the capsule is literally a "substance" which "contains" the heroin. *See Chapman*, slip op. at 30-31 (Cummings, J., dissenting) and cases cited. If one dose of LSD were dissolved into a glass of orange juice, it would be absurd to count the weight of the glass, much less the juice, in determining the weight of the LSD. It is no more logical to count the weight of the blotter paper or capsule or sugar cube that "contains" LSD.

It is a cardinal rule that statutes should be construed to

avoid absurd results. *Sheridan v. United States*, 487 U.S. 392, 402 n.7 (1988). It is equally important to avoid constructions that cast doubt upon the statute's constitutionality. *Public Citizen v. U.S. Dept. of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 2572, 105 L.Ed.2d 377, 399 (1989). These rules of construction suggest that the *Healy* court, and the dissenters in *Chapman*, properly construed the words "mixture or substance containing" LSD to exclude the LSD carrier.

The federal sentencing guidelines were intended to bring a degree of uniformity to sentences imposed upon similar offenders for similar crimes. As construed by the court below, the sentencing scheme mocks that purpose. The sentencing scheme mandates that identically situated defendants who distribute the same number of identical doses of LSD be given vastly different sentences if they have selected LSD carriers of substantially different weights. The statutory interpretation adopted by the majority of the court below ironically breeds a lack of uniformity in sentences imposed upon otherwise identical and equally culpable offenders.

The Supreme Court should review the conflict between the *Healy* decision and the *Chapman* decision, as the question of the correct interpretation of the words "mixture of substance containing" LSD has arisen frequently and will likely continue to do so. Given the ready availability and renewed popularity of LSD, more challenges to the sentencing guidelines in LSD cases can be expected. Uncertainty will merely foster more appeals until the

issues raised in this petition are finally decided by the Supreme Court.

II. A SENTENCING SCHEME WHICH REQUIRES SENTENCES TO BE BASED UPON AN ARBITRARY FACTOR VIOLATES THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW

A. The impairment of a criminal defendant's fundamental right to be sentenced fairly must be strictly scrutinized.

Defendants contend that their right to due process of law, and the correlative right to equal protection of the law, was violated when their sentences were based upon an arbitrary factor: the weight of the carrier to which their LSD was adhered. A preliminary issue raised, but not expressly decided, by the court below concerns the standard by which an appellate court should review this claim. Ordinarily, a claim that legislation yields arbitrary results, or that it imposes arbitrary classifications, is reviewed to determine whether the body enacting the legislation could have had a rational basis for believing that the distinction challenged as arbitrary furthers a legitimate governmental interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). When the challenged distinction has an impact upon the exercise of fundamental rights, however, the legislation must be strictly scrutinized, and will survive only if the government has a substantial and compelling interest in the classification. *See, e.g., Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969)(right to vote); *Shapiro v. Thompson*,

394 U.S. 618 (1969)(right to travel).

The *Chapman* court applied a rational basis test to 21 U.S.C. sec. 841 and to the sentencing guidelines. The challenged legislation, however, affects a defendant's right to be treated in a nonarbitrary way when the government takes away his or her liberty. The right to liberty is undeniably fundamental to our constitutional scheme. M. Forkosch, **Constitutional Law** sec. 335 at 338 (2d ed. 1969). While the scope of the term "liberty" is subject to intellectual debate[5] and is often viewed as merging with the concept of property,[6] the essence of liberty is freedom from imprisonment. The deprivation of individual liberty must be fairly imposed, and classifications which render the length of the deprivation arbitrary must be strictly scrutinized.

The right to be free from arbitrary deprivations of liberty -- stated differently, the right to be sentenced fairly -- must be regarded as fundamental. Commentators have regarded the general right to "fairness in the criminal justice system as a fundamental right to each individual." 2 R. Rotunda, J. Nowak, & J. Young, **Treatise on Constitutional Law: Substance and Procedure** sec. 18.41 at 700 (1986)(hereinafter **Treatise on Constitutional Law**). Professor Gunther discerns a fundamental right to the "fair administration of justice" from a number of Supreme Court rulings which guarantee fair treatment in the

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[5] *See generally* E. Corwin, **Liberty Against Government** (1948).

[6] Corwin, *supra* note 6, at 327; *Munn v. Illinois*, 94 U.S. 113, 142 (1877).

criminal justice process.[7] G. Gunther, **Individual Rights in Constitutional Law** 407 (2d ed. 1976). The Supreme Court acknowledged the existence of a right to fair treatment when it held that due process requires the review of criminal justice proceedings to assure that defendants are treated fairly throughout the entire course of the proceedings. *Rochin v. California*, 342 U.S. 165, 169 (1952). The Supreme Court reaffirmed the right to fair treatment when it recognized that the due process and equal protection clauses protect defendants against unequal treatment in all stages of the criminal justice system. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

Sentencing is an important aspect of the criminal justice process. It is recognized as a "critical stage" at which the right to be represented by counsel obtains. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). Accordingly, the right to fair and equal treatment in the criminal justice system must include the right to fair treatment in sentencing. **Treatise on Constitutional Law** sec. 18.41 at 703. The right is fundamental. It cannot be impaired simply because a rational reason might be imagined for

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[7] *Jackson v. Indiana*, 406 U.S. 715 (1972)(invalidating distinction between pretrial commitment of incompetent criminal defendants and incompetent noncriminal detainees); *Williams v. Illinois*, 399 U.S. 235 (1970)(holding unconstitutional imprisonment for failure to pay a fine to extent that length of imprisonment exceeds maximum sentence for crime); *Douglas v. California*, 372 U.S. 353 (1963)(constitutional right to appointed counsel on appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956)(indigent defendant entitled to free transcript when pursuing appeal).

doing so.[8]

In *Marshall v. United States*, 414 U.S. 417 (1974), the Supreme Court reported a lower court holding that there is no fundamental right to rehabilitation from narcotics addiction at public expense after conviction of a crime. The petitioner did not challenge the lower court holding, and the Supreme Court did not decide the question. Nonetheless, the Court of Appeals appears to have relied on *Marshall* for the proposition that its scrutiny of the constitutional challenge in this case should be conducted "under the highly deferential rational basis test." *Chapman*, slip op. at 16. A holding that there is no fundamental right to drug rehabilitation at public expense offers scant support for rejecting the fundamental right to be sentenced fairly.

The Supreme Court has never articulated the standard for reviewing substantive due process challenges to sentencing procedures. With appeals from guideline sentences becoming increasingly common, resolution of that standard would greatly benefit lower courts. The Supreme Court should accept review of this case to provide needed guidance to lower courts on a matter of far-reaching constitutional importance.

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[8] *See Marshall v. United States*, 414 U.S. 417, 432-33 (1974) (Marshall, J., dissenting)(legislative classification which results in imprisonment should not be examined under the minimal standard of rationality appropriate to economic regulation, because such a case "does not involve discrimination against business interests more than powerful enough to protect themselves in the legislative halls, but the very life and health of a man caught up in the spiraling web of addiction and crime.")

B. Basing a sentence upon an arbitrary factor violates a criminal defendant's right to due process of law.

1. *The Fifth Amendment to the United States Constitution prohibits the arbitrary exercise of governmental power.*

The Fifth Amendment to the United States Constitution prohibits the government from depriving a person of his or her liberty without due process of law. The right to due process has both a procedural and a substantive component. While the notion of substantive due process has been the subject of enduring debate, it has long been recognized that "fair play" is "the essence of due process." *Galvan v. Press*, 347 U.S. 522, 530 (1954). Accordingly, legislation that shocks that sense of fair play violates due process. *Id.*

The narrow majority in *Chapman* considered substantive due process to be "a judicial invention" and an "elusive doctine." *Chapman*, slip op. at 13. Perhaps the boundaries of the concept are elusive. The core of the right is clearly defined. At its heart is the right to be free from the arbitrary exercise of governmental power.

The due process right to be free from arbitrary assertions of governmental power is not a "judicial invention." The phrase "due process" derives from the Magna Charta, but the belief that a governing body is bound by substantive limits can be traced to the medieval acceptance of divine law, and to the eighteenth century philosophy of natural law. Tribe, *Substantive Due Process of Law*, in 4 L. Levy, ed., **Encyclopedia of the American**

Constitution 1797, 1797 (1986). To the American colonists, due process of law was not merely a guaranty of procedural fairness, but "a protection against arbitrary government in general." R. Mott, **Due Process of Law** 123 (1926). By the time of the Revolutionary War, the colonists viewed the due process clause of the Magna Charta as prohibiting the arbitrary exercise of power by officials of the royal government. *Id.* at 142. When the Fifth Amendment due process clause was drafted, the substantive prohibition against governmental arbitrariness was universally understood. *Id.* at 159.

The Supreme Court has historically recognized a substantive right to be free from the arbitrary exercise of governmental power. In an early exprssion of that view, Justice Johnson wrote:

> As to the words of the Magna Charta ... after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia v. Okely, 4 Wheat. 235, 244 (1819). The Supreme Court consistently condemned the arbitrary exercise of power throughout the nineteenth century. R. Mott, *supra*, at 266. One of the more frequently cited cases asserting the right to be free from arbitrary governmental decision-making is *Hurtado v. California*, 110 U.S. 516 (1884), which reminded the nation that law "is something more than mere will exerted as an act of power.... Arbitrary power, enforcing its edicts to the injury of the

persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or an impersonal multitude." *Hurtado*, 110 U.S. at 535-36.

Modern Supreme Court decisions continue to recognize that the government must not be permitted to exercise its power arbitrarily. While substantive due process is no longer seen as prohibiting governmental regulation in the fields of economics and social welfare, *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970), it remains a vital check against the unbridled exercise of arbitrary governmental power. E. Corwin, **The Constitution and What It Means Today** 330 (13th rev. ed. 1973). The Supreme Court continues to recognize that due process of law forbids the government to act arbitrarily. *See, e.g., Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 675 n.10 (1976)(the "critical constitutional inquiry" is whether governmental action "produces arbitrary or capricious results"); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)("The touchstone of due process is protection of the individual against arbitrary action of government."); *U.S. Dept. of Agriculture v. Morend*, 413 U.S. 538 (1973)(exclusion of any household containing an unrelated individual from food stamp eligibility deemed arbitrary and held to violate due process). Thus, whatever its limitations might be as a vehicle for developing "new" constitutional rights or as a means to limit economic or social welfare legislation, the substantive due process standard is alive and well as a protection against arbitrary governmental action.

2. *The Fifth Amendment to the United States Constitution prohibits governmental actions based upon arbitrary classifications of persons.*

The Fourteenth Amendment, which guarantees the right to equal protection of the law, applies by its terms to the states, not to the federal government. The Fifth Amendment right to due process, however, includes an equal protection component. *Schelsinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Equal protection requires legislative classifications to be reasonable in light of the legislation's purpose. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Thus, due process bars a statute wich "manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). *Accord, Reed v. Reed*, 404 U.S. 71 (1971)(arbitrary preference given to men over women for position as estate administrator denies right to equal protection of laws).

3. *Basing an LSD distributor's sentence upon the weight of the carrier to which the LSD is adhered mandates arbitrary sentencing and violates due process of law.*

Even if the sentencing scheme at issue in this case is not strictly scrutinized, it fails to satisfy the most minimal demands of due process. The sentencing scheme mandates arbitrariness by requiring sentences to reflect an arbitrary factor: the weight of the carrier to which the LSD is adhered.

The weight of an LSD carrier has no rational relationship to

the amount of LSD distributed, or to the social harm caused by the distributor. LSD is sold by the dose, not by weight. A dose of LSD has the same potency and sells for the same price whether delivered on heavy blotter paper, light blotter paper, a gelatin capsule, a sugar cube, a piece of candy, or an animal cracker. A retailer who sells one thousand doses adhered to blotter paper commits the same crime, makes the same profit, and causes the same social harm, as a retailer who sells one thousand identical doses adhered to gelatin capsules. If the offenders are identical in all other ways, it is arbitrary to sentence them differently. Certainly, it must be deemed unconstitutionally arbitrary to require courts to sentence them differently, yet the sentencing scheme at issue does just that.

The sentencing guidelines, within which sentencing courts are compelled to operate, base sentences upon the weight of the LSD and its carrier. Sentences are enhanced as weight increases. The court in *United States v. Daly*, 883 F.2d 313, 318 (4th Cir. 1989), sympathetic to the absurd results that this scheme causes, charted the different offense levels that identically situated LSD defendants face, varying only the type of LSD carrier:

Carrier	Weight (single dose)	Offense level (100 doses)
sugar cube	2,270.00 mg.	36
blotter paper	14.00 mg.	26
LSD alone	.05 mg.	12

Thus, defendants with identical histories who commit identical

crimes -- the crime of selling one hundred doses of LSD -- must be subject to widely disparate sentences based upon the weight, or absence, of a drug carrier. The dealer who distributes LSD on sugar cubes will pay the highest price; the dealer who distributes LSD without a carrier will receive the shortest sentence. Yet each dealer will have committed exactly the same crime, causing exactly the same social harm. It is irrational to treat the sugar cube dealer more harshly than the blotter paper dealer, or to treat the blotter paper dealer more harshly than the gelatin capsule dealer, or to treat the pure LSD dealer (who is probably at a higher point in the distribution chain) least harshly of all.

The majority opinion in *Chapman* suggests that the threat of arbitrary sentencing under this scheme is theoretical. Arbitrary results in LSD sentences are readily observable. One thousand doses of LSD adhered to gelatin capsules were found to weigh 2.25 grams in *United States v. McGeehan*, 824 F.2d 677, 680 n.4 (8th Cir. 1987). This is less than half the weight of the same number of doses of LSD distributed by the defendants in the *Chapman* case. In *United States v. Johnson*, 888 F.2d 1255, 1256 (8th Cir. 1989), the weight of 4,300 doses of LSD was found, for sentencing purposes, to be 430 milligrams, far less than the weight of the 1,000 doses distributed by the *Chapman* defendants. Thus, the base offense levels of the defendants in *McGeehan* and *Johnson* would be less than the base offense levels to which the *Chapman* defendants were subjected, despite the fact that McGeehan distributed the same number of doses of LSD while Johnson distributed more than four times as many doses.

The articulated purpose of the sentencing scheme is to punish more severely those retailers who deliver larger quantities of controlled substances. *United States v. Savinovich*, 845 F.2d 834, 839 (9th Cir. 1988). Basing sentences upon the weight of the LSD carrier does not rationally advance that end. Dealers who distribute a few doses of LSD on heavier carriers receive longer sentences than dealers who sell substantially greater quantities of LSD on lighter carriers. The absence of any meaningful relationship between the weight of the carrier and the number of doses sold "manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). Classifying criminal defendants along arbitrary lines at sentencing violates the defendants' entitlement to equal protection of the law.

The due process and equal protection challenges raised in this case have been addressed only by the *Chapman* court. Given the rapidly increasing number of LSD cases appearing in the federal reporter, the issue is certain to arise again in other circuits, as well as in states that have modeled their drug enforcement legislation after the federal code. The *Chapman* court deemed the issue sufficiently important to require an *en banc* rehearing. The decision sharply divided the court. Sentencing issues in the new world of the federal guidelines which are so divisive, and so likely to arise again and again as the drug

war continues to expand, should be resolved by the Supreme Court.

CONCLUSION

This case presents important constitutional issues squarely and cleanly. No material facts are in dispute; the most relevant facts are established by stipulation. The Supreme Court can save lower courts from years of litigation by accepting review and examining the constitutional implications of legislation that mandates arbitrariness in sentencing.

Dated: September 11, 1990.

Respectfully submitted,

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APPENDIX

Decision of U.S. Court of Appeals 1A
Decision and Order of District Court 26A
Stipulation 32A
Judgment of Conviction (Chapman) 33A
Judgment of Conviction (Schoenecker) 37A
Judgment of Conviction (Brumm) 41A

Before BAUER, *Chief Judge*, and CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Two cases consolidated for decision in banc present three questions concerning the application and constitutionality of the statute and sentencing guidelines that govern sales of lysergic acid diethylamide (LSD). Stanley J. Marshall was convicted after a bench trial and sentenced to 20 years' imprisonment for conspiring to distribute, and distributing, more than ten grams of LSD, enough for 11,751 doses. Patrick Brumm, Richard L. Chapman, and John M. Schoenecker were convicted by a jury of selling ten sheets (1,000 doses) of paper containing LSD. Because the total weight of the paper and LSD was 5.7 grams, a five-year mandatory minimum applied. The district court sentenced Brumm to 60 months (the minimum), Schoenecker to 63 months, and Chapman to 96 months' imprisonment. All four defendants confine their arguments on appeal to questions concerning their sentences.

The three questions we must resolve are these: (1) Whether 21 U.S.C. §841(b)(1)(A)(v) and (B)(v), which set mandatory minimum terms of imprisonment—five years for selling more than one gram of a "mixture or substance containing a detectable amount" of LSD, ten years for more than ten grams—exclude the weight of a carrier medium. (2) Whether the weight tables in the sentencing guidelines likewise exclude the weight of any carrier. (3) Whether the statute and the guidelines are unconstitutional to the extent their computations are based on anything other than the weight of the pure drug. Marshall presents some additional questions concerning his sentence that are important only if we get past these three.

I

According to the Sentencing Commission, the LSD in an average dose weighs 0.05 milligrams. Twenty thousand pure doses are a gram. But 0.05 mg is almost invisible,

so LSD is distributed to retail customers in a carrier. Pure LSD is dissolved in a solvent such as alcohol and sprayed on paper or gelatin; alternatively the paper may be dipped in the solution. After the solvent evaporates, the paper or gel is cut into one-dose squares and sold by the square. Users swallow the squares or may drop them into a beverage, releasing the drug. Although the gelatin and paper are light, they weigh much more than the drug. Marshall's 11,751 doses weighed 113.32 grams; the LSD accounted for only 670.72 mg of this, not enough to activate the five-year mandatory minimum sentence, let alone the ten-year minimum. The ten sheets of blotter paper carrying the 1,000 doses Chapman and confederates sold weighed 5.7 grams; the LSD in the paper did not approach the one-gram threshold for a mandatory minimum sentence. This disparity between the weight of the pure LSD and the weight of LSD-plus-carrier underlies the defendants' arguments.

A

If the carrier counts in the weight of the "mixture or substance containing a detectable amount" of LSD, some odd things may happen. Weight in the hands of distributors may exceed that of manufacturers and wholesalers. Big fish then could receive paltry sentences or small fish draconian ones. Someone who sold 19,999 doses of pure LSD (at 0.05 mg per dose) would escape the five-year mandatory minimum of §841(b)(1)(B)(v) and be covered by §841(b)(1)(C), which lacks a minimum term and has a maximum of "only" 20 years. Someone who sold a single hit of LSD dissolved in a tumbler of orange juice could be exposed to a ten-year mandatory minimum. Retailers could fall in or out of the mandatory terms depending not on the number of doses but on the medium: sugar cubes weigh more than paper, which weighs more than gelatin. One way to eliminate the possibility of such consequences is to say that the carrier is not a "mixture or substance containing a detectable amount" of the drug. Defendants ask us to do this.

2A

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-2420

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STANLEY J. MARSHALL,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 88-30051—Richard Mills, *Judge*.

Nos. 89-3364, 89-3390, and 89-3391

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Wisconsin.
No. 89 CR 46—Barbara B. Crabb, *Chief Judge*.

ARGUED JANUARY 22, 1990, and APRIL 18, 1990
REARGUED IN BANC MAY 30, 1990—DECIDED JULY 17, 1990

1A

Defendants' submission starts from the premise that the interaction of the statutory phrase "mixture or substance" with the distribution of LSD by the dose in a carrier creates a unique probability of surprise results. The premise may be unwarranted. The paper used to distribute LSD is light stuff, not the kind used to absorb ink. Chapman's 1,000 doses weighed about 0.16 ounces. More than 6,000 doses, even in blotter paper, weigh less than an ounce. Because the LSD in one dose weighs about 0.05 milligrams, the combination of LSD-plus-paper is about 110 times the weight of the LSD. The impregnated paper could be described as "0.9% LSD".[1] Gelatin carrying LSD could be described as "2.5% LSD", if the weight for gelatin given in *United States v. McGeehan*, 824 F.2d 677, 680 (8th Cir. 1987), is accurate.

This is by no means an unusual dilution rate for illegal drugs. Heroin sold on the street is 2% to 3% opiate and the rest filler. Jerome J. Platt, *Heroin Addiction: Theory, Research, and Treatment* 48-50 (1986). Sometimes the mixture is even more dilute, approaching the dilution rate for LSD in blotter paper. E.g., *United States v. Buggs*, No. 89-2130 (7th Cir. May 18, 1990), slip op. 4 (conviction for sale of 9.95 grams of 1.2% heroin). Heroin and crack cocaine, like LSD, are sold on the streets by the dose, although they are sold by weight higher in the distribu-tional chain. All of the "designer drugs" and many of the opiates are sold by the dose, often conveniently packaged in pills. The Sentencing Commission lists MDA, PCP, psilocin, psilocybin, methaqualone, phenmetrazine, and amphetamines (regular and meth-) along with LSD as

[1] The 1,000 doses in *Chapman* weighed 5.7 grams, or 0.0057 grams per dose. The 11,751 doses in *Marshall* weighed 113.32 grams, or 0.00964 grams per dose. Marshall apparently sold premium LSD; the forensic chemist concluded that his 11,751 squares of blotter paper contained 670.72 milligrams of LSD, or 0.057 mg per dose—14% more per dose than the Sentencing Commission's norm of 0.05 mg. The substance Marshall sold was 0.59% LSD; the substance the other three sold was 0.877% LSD.

drugs sold by the dose in very dilute form. 55 Fed. Reg. 19197 (May 8, 1990) (amending Application Note 11 to U.S.S.G. 2D1.1). Other drugs, such as dilaudid and dolaphine, are sold by the pill rather than weight, and it is safe to assume that all have far less than 100% active ingredients.

Just as it is hasty to assume that the carrier produces a unique dilution factor for LSD, so it is unwarranted to assume that LSD as it leaves the refinery is pure, and therefore weighs only 0.05 mg per dose. Solid LSD weighs that little, but is it shipped dry? Neither the record nor the sparse literature tells us. LSD is applied to a carrier in a solvent such as alcohol. How dilute is this solution? If we assume that one drop of liquid is applied to each square of blotter paper, then the liquid is only 0.1% LSD.[2] We do not know whether one drop per dose is right, but, if it is, the solution weighs 8.5 times as much per dose as blotter paper: a dose of LSD in alcohol weighs 0.0487 grams, while a dose of LSD in blotter paper weighs 0.0057 grams.[3] A manufacturer caught with wholesale quantities of LSD solution that had not been applied to blotter paper would face sentences *higher* than those who possess only the paper containing the drug.

So there may be nothing extraordinary about LSD, no reason to think that the statute operates differently for LSD than for heroin. Heroin comes into this country pure; it is sold diluted on the street, creating the possibility

[2] One drop is equivalent to one minim, or 0.06161 milliliters. That implies about 16,231 drops per liter. One liter of water weighs a kilogram. Ethyl alcohol has a specific gravity of 0.7893, so a liter of ethyl alcohol weighs 0.7893 kilograms. LSD weighs 0.05 mg per hit. So 16,231 doses of LSD weigh 0.811 grams. A liter of alcohol containing these doses weighs 790.11 grams (the 789.3 grams of alcohol plus the 0.811 grams of LSD). Thus the solution is 0.103% LSD.

[3] In *Chapman*, in which 1,000 doses weighed 5.7 grams. LSD dissolved in alcohol weighs only 5.05 times as much per dose as LSD in Marshall's heavier blotter paper (see note 1 above).

that §841 will require higher sentences for retailers than for smugglers or refiners. The dilution factor for retail heroin is not significantly different from the factor for LSD on blotter paper. LSD in solution weighs more than LSD on blotter paper; pure heroin weighs (much) less per dose than the dilute heroin sold on the street. Heroin is sold in different cities at different dilution rates; that implies that the weight of a packet of heroin for a single administration weighs more in some cities than in others. The percentage difference exceeds the gap between paper and gelatin, the common carriers of LSD. Office of Intelligence, Drug Enforcement Administration, *Domestic Monitor Program: Summary Report Fiscal Year 1989*. So although §841 creates the possibility of erratic application in LSD cases, it is important to recognize that the normal case involves neither extreme weight (LSD in orange juice) nor extreme purity (19,999 doses weighing less than a gram). With this understanding, we turn to the statute.

B

It is not possible to construe the words of §841 to make the penalty turn on the net weight of the drug rather than the gross weight of carrier and drug. The statute speaks of "mixture or substance containing a detectable amount" of a drug. "Detectable amount" is the opposite of "pure"; the point of the statute is that the "mixture" is not to be converted to an equivalent amount of pure drug.

The structure of the statute reinforces this conclusion. The 10-year minimum applies to any person who possesses, with intent to distribute, "100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP)", §841(b)(1)(A)(iv). Congress distinguished the pure drug from a "mixture or substance containing a detectable amount of" it. All drugs other than PCP are governed exclusively by the "mixture or substance" language. Even brute force cannot turn that language into a reference to pure LSD. Congress used the same "mixture or

substance" language to describe heroin, cocaine, amphetamines, and many other drugs that are sold after being cut—sometimes as much as LSD. There is no sound basis on which to treat the words "substance or mixture containing a detectable amount of", repeated verbatim for every drug mentioned in §841 except PCP, as *different* things for LSD and cocaine although the language is identical, while treating the "mixture or substance" language as meaning the *same* as the reference to pure PCP in 21 U.S.C. §841(b)(1)(A)(iv) and (B)(iv).

Although the "mixture or substance" language shows that the statute cannot be limited to pure LSD, it does not necessarily follow that blotter paper *is* a "mixture or substance containing" LSD. That phrase cannot include all "carriers". One gram of crystalline LSD in a heavy glass bottle is still only one gram of "statutory LSD". So is a gram of LSD being "carried" in a Boeing 747. How much mingling of the drug with something else is essential to form a "mixture or substance"? The legislative history is silent, but ordinary usage is indicative.

"Substance" may well refer to a chemical compound, or perhaps to a drug in a solvent. LSD does not react chemically with sugar, blotter paper, or gelatin, and none of these is a solvent. "Mixture" is more inclusive. Cocaine often is mixed with mannitol, quinine, or lactose. These white powders do not react, but it is common ground that a cocaine-mannitol mixture is a statutory "mixture".

LSD and blotter paper are not commingled in the same way as cocaine and lactose. What is the nature of their association? The possibility most favorable to defendants is that LSD sits on blotter paper as oil floats on water. Immiscible substances may fall outside the statutory definition of "mixture". The possibility does not assist defendants—not on this record, anyway. LSD is applied to paper in a solvent; after the solvent evaporates, a tiny quantity of LSD remains. Because the fibers absorb the alcohol, the LSD solidifies inside the paper rather than on it. You cannot pick a grain of LSD off the surface of

the paper. Ordinary parlance calls the paper containing tiny crystals of LSD a mixture.

United States v. Rose, 881 F.2d 386 (7th Cir. 1989), like every other appellate decision that has addressed the question,[4] concludes that the carrier medium for LSD, like the "cut" for heroin and cocaine, is a "mixture or substance containing a detectable amount" of the drug. Although a chemist might be able to offer evidence bearing on the question whether LSD and blotter paper "mix" any more fully than do oil and water, the record contains no such evidence. Without knowing more of the chemistry than this record reveals, we adhere to the unanimous conclusion of the other courts of appeals that blotter paper treated with LSD is a "mixture or substance containing a detectable quantity of" LSD.

C

Two reasons have been advanced to support a contrary conclusion: that statutes should be construed to avoid constitutional problems, and that some members of the sitting Congress are dissatisfied with basing penalties on the combined weight of LSD and carrier. Neither is persuasive.

A preference for giving statutes a constitutional meaning is a reason to construe, not to rewrite or "improve". E.g., *United States v. Monsanto*, 109 S. Ct. 2657, 2664 (1989); *United States v. Albertini*, 472 U.S. 675, 680 (1985).

[4] *United States v. Daly*, 883 F.2d 313 (4th Cir. 1989); *United States v. Taylor*, 868 F.2d 125 (5th Cir. 1989); *United States v. Elrod*, 898 F.2d 60 (6th Cir. 1990); *United States v. Bishop*, 894 F.2d 981 (8th Cir. 1990); *United States v. Larsen*, 1990 U.S. App. LEXIS 8792 (10th Cir.). See also *United States v. Skelton*, 901 F.2d 1204, 1206 (4th Cir. 1990) (although "Congress has drawn a distinction between pure PCP and PCP mixtures, it has not drawn a like distinction with respect to PCPy or any other hallucinogen"; holding that the full weight of a PCPy mixture counts, even though PCPy is a close chemical relation to PCP); *Tennessee v. Elphee*, 1989 Tenn. Cr. App. LEXIS 163 at 9-10 (weight of blotter paper counted under state law identical to §841).

Canons are doubt-resolvers, useful when the language is ambiguous and "a construction of the statute is *fairly possible* by which the question may be avoided", *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (emphasis added). "[S]ubstance or mixture containing a detectable quantity" is not ambiguous, avoidance not "fairly possible". Neither the rule of lenity nor the preference for avoiding constitutional adjudication justifies disregarding unambiguous language.

The canon about avoiding constitutional decisions, in particular, must be used with care, for it is a closer cousin to invalidation than to interpretation. It is a way to enforce the constitutional penumbra, and therefore an aspect of constitutional law proper. Constitutional decisions breed penumbras, which multiply questions. Treating each as justification to construe laws out of existence too greatly enlarges the judicial power. And heroic "construction" is unnecessary, given our conclusion in Part III that Congress possesses the constitutional power to set penalties on the basis of gross weight.

As for the pending legislation: subsequent debates are not a ground for avoiding the import of enactments. E.g., *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 733-34 & n.14 (1977); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974). Although the views of a subsequent Congress are entitled to respect, ongoing debates do not represent the views of Congress. Judge Wilkins, Chairman of the Sentencing Commission, wrote a letter to Senator Biden, Chairman of the Judiciary Committee, remarking that "it is unclear whether Congress intended the carrier to be considered as a packaging material, or since it is commonly consumed along with the illicit drug, as a dilutent ingredient in the drug mixture". The Chairman of the Commission invited the Chairman of the Committee to introduce legislation choosing one or the other explicitly.

Senator Biden introduced an amendment to S. 1711, the Administration's omnibus drug bill, stating in materials read into the Congressional Record that the amendment

changes the statute to omit the weight of the carrier. 135 Cong. Rec. S 12748 (daily ed. Oct. 5, 1989). So far as we can determine, the language he actually introduced did not contain the text to which his prepared statement referred. No language of this kind appears in the version the Senate passed. 135 Cong. Rec. S 13433 (daily ed. Oct. 16, 1989) (text of bill that Senate sent to House). The House is yet to act. Senator Kennedy has introduced an amendment to other legislation affecting the criminal code, which, like Senator Biden's, would exclude the carrier. Amendment No. 1716 to S. 1970, 136 Cong. Rec. S 7069 (daily ed. May 24, 1990). But this proposal, too, awaits enactment. Both Senator Kennedy's proposal and Senator Biden's statement are more naturally understood as suggestions for change than as evidence of today's meaning. At all events, the Senators were speaking for themselves, not for Congress as an institution. See *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978).

Statements supporting proposals that have not been adopted do not inform our reading of the text an earlier Congress passed and the President signed, see *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 956 (1989). We may not, in the name of faithful interpretation of what the political branches *enacted*, treat as authoritative the statements of legislators supporting change. Opinion polls of Senators are not law. See *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1438-39 (7th Cir. 1988). See also *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989).

II

Only Brumm received a mandatory minimum sentence. Everyone else could have received the same sentence if all minima were excised from §841, and if the weights in the statute were read as referring to pure LSD rather than to LSD-plus-carrier. The sentences of Marshall (20 years), Chapman (8 years), and Schoenecker (63 months) are derived largely from the sentencing guidelines. Understandably, these defendants argue that whether or not

the statute counts the carrier medium, the quantity table in the guidelines does not.

This is not a strong argument. The guidelines speak of "mixture or substance", the statutory language. Footnote * to the quantity table at U.S.S.G. 2D1.1 says that "[u]nless otherwise specified, the weight of the controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Only PCP and methamphetamine are "otherwise specified". Application Note 9 reiterates that the footnote allows purity adjustments only for PCP and methamphetamine. Application Note 1 to §2D1.1 says that " 'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. §841." As we observed in *United States v. Pinto*, 875 F.2d 143 (7th Cir. 1989), and *United States v. White*, 888 F.2d 490 (7th Cir. 1989), these notes are taken seriously as contemporaneous explanations by the authors. To conclude that the carrier medium is a statutory "mixture or substance" is to conclude that its weight counts under the guidelines as well.

For what it is worth, the guidelines demonstrates the view of the Sentencing Commission that the statutory weights include dilutents and carriers. None of the references to purity in the guidelines makes sense if the weights in the statute deal with pure drugs to start with. The Commission's most recent words reinforce the conclusion that it understands both the statute and the guidelines to include the weight of the carrier medium for LSD. Recently the Commission transmitted to Congress a proposed amendment to U.S.S.G. 2D1.1 Application Note 11, the conversion table for cases in which only the number of doses is known. See 55 Fed. Reg. 19197 (May 8, 1990). This table gives LSD a weight of 0.05 mg per dose (20,000 doses per gram). The amendment specifies that the number of doses is not to be used to derive the weight of the "mixture or substance" if the actual weight is known, a caution necessary only if "mixture or substance" includes the carrier medium. Lest the smallest

That someone else's sentence might be disproportionate to their offenses is no reason for altering these defendants' punishments. Effects of statutes on strangers are in general not sufficient to prevent application to oneself (this is not a first amendment case), and in particular the claim that someone else may not be punished severely enough is not a good objection to one's own punishment. *Wayte v. United States*, 470 U.S. 598, 607-10 (1985); *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Falls v. Town of Dyer*, 875 F.2d 146 (7th Cir. 1989). Prosecutors possess the power to excuse the big cheeses while landing on the small fry with hobnail boots. Discretion, even if it ends in grossly unequal treatment according to culpability, does not entitle a guilty defendant to avoid a sentence appropriate to his own crime. So too when the possibility may be attributed to the statute rather than (or in addition) to prosecutorial choice. See *United States v. Batchelder*, 442 U.S. 114, 124-26 (1979), holding that it does not violate the due process clause to enact two statutes providing different penalties for identical conduct—the mirror image of the claim in this case that the statutes do too little to impose graduated penalties for different conduct.

Until this century Congress did not attempt to differentiate sentences according to culpability, and it did not authorize judges to do so. Statutes often set out flat penalties for specified crimes, such as the sanction of 25 years' imprisonment for armed robbery of a postal carrier, 18 U.S.C. §2114 (repealed in 1984), a term impervious to such variables as the amount taken and the use of violence. Courts thought identical (and severe) treatment of greatly different offenses constitutional. E.g., *United States v. Smith*, 602 F.2d 834 (8th Cir. 1979); *Smith v. United States*, 284 F.2d 789, 791 (5th Cir. 1960). We recounted the history briefly in *Pinto*, in the course of holding that the sentencing guidelines do not violate the due process clause by diminishing sentencing judges' discretion to tailor sentences closely to offense and offender.

Pinto rests on a conclusion that the due process clause allows Congress to write with broad strokes, recognizing that there will be a poor fit between the statutory elements of the offense and the sentence attached to them if other important factors are left out. (Here the omitted factor is the purity of the "mixture or substance".) Every other court of appeals has agreed with *Pinto*.[7] Judges, who in the era between the end of uniform penalties and the creation of the guidelines had discretion to impose such sentences as pleased them, also may create disparity. Some judges thought wholesalers the principal threat; some were offended by retailers; some thought young criminals especially deserving of punishment; others excused women when men would have received high sentences for identical conduct. It was this crazy-quilt of incompatible yet unreviewable sentences, *Dorszynski v. United States*, 418 U.S. 424, 440-41 (1974), that the 1984 code and the guidelines were designed to replace. No one supposes, however, that the pre-guideline practice was unconstitutional, even though the potential for disparity had been realized.

Neither uniform sentences that disregard characteristics of offense and offender, nor sentences so thoroughly discretionary that they are not comparable from one judge to another, violate the due process clause. Both systems have been tried in the United States and deemed constitutional. If they are constitutional, so is §841. Maybe Congress ought to make the statute books more rational.

[7] *United States v. Fox*, 889 F.2d 357 (1st Cir. 1989); *United States v. Vizcaino*, 870 F.2d 52 (2d Cir. 1989); *United States v. Frank*, 864 F.2d 992 (3d Cir. 1988); *United States v. Bolding*, 876 F.2d 21 (4th Cir. 1989); *United States v. White*, 869 F.2d 822 (5th Cir. 1989); *United States v. Allen*, 873 F.2d 963 (6th Cir. 1989); *United States v. Brittman*, 872 F.2d 827 (8th Cir. 1989); *United States v. Brady*, 895 F.2d 538 (9th Cir. 1990); *United States v. Thomas*, 884 F.2d 540 (10th Cir. 1989); *United States v. Erves*, 880 F.2d 376 (11th Cir. 1989); *United States v. Lafayette*, 1990 U.S. App. LEXIS 2979 (D.C. Cir.).

ambiguity remain, the Commission puts an asterisk after LSD and adds (emphasis added): "[T]he weight per unit shown is the weight of the actual controlled substance, *and not generally the weight of the mixture or substance containing the controlled substance.* Therefore, use of this table provides a very conservative estimate of the total weight." Couldn't be clearer that the Sentencing Commission believes that the weight of the carrier is part of the total "mixture or substance" under both the statute and the guidelines.

III

A constitutional question remains, given our construction of the statute and guidelines. The provision of the Constitution reading on sentences is the eighth amendment, forbidding the infliction of "cruel and unusual punishment". Marshall, alone among the four defendants, invokes the eighth amendment. It offers weak support at best. *Hutto v. Davis*, 454 U.S. 370 (1984), holds that 40 years is not constitutionally excessive for distributing nine ounces of marijuana. Marshall got 20 for a more serious crime. Many federal courts have held that sentences in this range may be imposed for selling similar volumes of LSD.[5] Other courts have sustained life without parole for drug offenses.[6] LSD causes psychoses, sometimes leading to suicide or violent aggression. Terrence C. Cox, Michael R. Jacobs, A. Eugene LeBlanc & Joan A. Marshman, *Drugs and Drug Abuse: A Reference Text* 311-15 (1983);

[5] Including our own opinion in *Rose*, which held that five years for 472 doses of LSD is consistent with the eighth amendment. See also, e.g., *Bishop* (151 months permissible for possession of 3500 doses).

[6] *Michigan v. Harmelin*, 176 Mich. App. 525, 440 N.W.2d 75 (1989), cert. granted, No. 89-7272 (May 29, 1990) (less than one kilogram of cocaine); *United States v. Aiello*, 864 F.2d 257 (2d Cir. 1988); *Terreborne v. Butler*, 848 F.2d 500 (5th Cir. 1988) (in banc); *United States v. Stewart*, 820 F.2d 1107 (9th Cir. 1987) (Kennedy, J.).

Albert Hofmann, *LSD: My Problem Child* 67-73 (1979). Society believes that the sale of hallucinogens is a serious crime, and severe sentences constitutionally may attend the crimes troubling to the people. *Rummel v. Estelle*, 445 U.S. 263 (1980); *United States v. Sanchez*, 859 F.2d 483 (7th Cir. 1988); *United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985).

A

Although these defendants received sentences within the limits set by the eighth amendment—the provision of the Bill of Rights expressly addressed to quantum of punishment—they insist that their sentences are unconstitutional under the due process clause of the fifth amendment. Yet defendants received ample "process". Their complaint is about substance, not process. Substantive due process, a judicial invention, is least applicable when a provision of the Constitution directly addresses the subject. *Graham v. Connor*, 109 S. Ct. 1865 (1989) (substantive due process is not an appropriate way to analyze excessive force in arrests, given the fourth amendment); see also *Chicago Board of Realtors, Inc. v. Chicago*, 819 F.2d 732, 742-45 (7th Cir. 1987); *United States v. Miller*, 891 F.2d 1265, 1271-73 (7th Cir. 1989) (concurring opinion). This is not an appropriate case for the deployment of that elusive doctrine.

Defendants' arguments are not so much about the sentences handed out for LSD in blotter paper as they are objections to the possibility that other persons will receive sentences much too long (LSD in orange juice) or too short (19,999 doses in pure form). But these are only possibilities, which have nothing to do with these sentences. *Defendants'* sentences bear rational relations to *their* offenses. That is all the Constitution requires, unless criminal defendants are entitled to assert third parties' rights to better sentencing practices—which they are not. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Schall v. Martin*, 467 U.S. 253, 269 n.18 (1984); *United States v. Raines*, 362 U.S. 17, 21 (1960).

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would not draw a *mandatory* minimum is of no moment. He could and likely would get the 20 years per count authorized by §841(b)(1)(C), and probably there would be more than one count. A manufacturer or wholesaler will be involved in a conspiracy, the sentence for which may be tacked on to the sentence for the amount possessed or sold.

That is not the half of it. The *real* punishment for a manufacturer or a major wholesaler of any drug is not set by §841. It is set by the Continuing Criminal Enterprise statute, 21 U.S.C. §848. This law, "a carefully crafted prohibition . . . designed to reach the 'top brass' in the drug rings", *Garrett v. United States*, 471 U.S. 773, 781 (1985), comes into play whenever a person organizes or supervises a criminal enterprise, involving at least five others, from which he earns substantial income. Major distributors fall within the statute, *United States v. Bond*, 847 F.2d 1233 (7th Cir. 1988), as do those who aid and abet the drug chieftains, *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989) (in banc). Persons who escape the jaws of §841 walk into the maw of §848. The CCE offense carries a minimum term of 20 years' imprisonment. If the defendant is "the principal administrator" and the enterprise has gross receipts of $10 million per year, the mandatory penalty is life without parole, 21 U.S.C. §848(b). There is in theory little risk, and in practice none, that the major players in the manufacture and distribution of LSD or any other illegal drug will be treated lightly compared with the four middlemen now before us. Defendants might have established that, despite all appearances, sentences are unrelated (or inversely related) to the amount of pure LSD involved. Yet they introduced no evidence to this effect, and none has been published in the social science literature. Persons who want a court to hold a statute unconstitutional need to do more than speculate. *Odgen v. Saunders*, 25 U.S. (12 Wheat.) 212, 270 (1827) (opinion of Washington, J.).

Although the parties say that Congress legislated in ignorance, we lack support for that belief. Congress itself

says the opposite, that it selected the weights in the table "after consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs". H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 11 (1986). Agents and prosecutors are well-acquainted with the effects of different drugs and the details of their distribution. The numbers in §841 are not hat sizes. Yet even if we attribute unfamiliarity to Congress, we must recognize our own innocence of data. We do not know whether LSD leaves the factory (a) pure and dry, (b) on blotter paper, or (c) dissolved in alcohol (and, if in solution, at what rate of dilution). The range of weights per dose spans at least three orders of magnitude (see notes 1-3 above). If LSD is shipped in solution, then the higher-ups draw longer sentences per dose than do retailers; if shipped in blotter paper the sentences are the same per dose. We do not know the extent to which blotter paper dominates retail sales; if it holds the lion's share, then the risk of erratic sentences at the retail tier is small. We do not know the actual distribution of sentences. For all we can tell, sentences in LSD cases come *closer* to a smooth upward graduation per dose than do sentences for cocaine and heroin.[9] Lacking these facts, we are in

[9] Judge Posner's dissenting opinion contends that the number of doses of LSD accounts for only 16% to 23% of the variance in sentences. This is a hypothetical calculation; data about the lengths of actual sentences (which we do not possess) may put things in better light, or may show that the correlation for LSD is no worse than that for other drugs. Judge Posner's hypothetical cases include many in which LSD is distributed on sugar cubes. Sugar cubes are so heavy compared to blotter paper that one might as well examine the effect on sentences of distributing LSD in bricks. If you remove the sugar cube hypotheticals from Judge Posner's sample (a plausible step, since there has not been even one sugar cube prosecution under §841), the number of doses then explains 59.6% of the variance in sentences.

Contrast heroin, which is sold pure at wholesale and diluted at retail. Assume an average purity in retail sales of 2.5%, and 100% purity in wholesale sales. Assume also that the heroin is sold at

(Footnote continued on following page)

Maybe it ought to specify that the sentence increases as a function of the net rather than the gross weight of the drug, but the task of determining how close to make the fit between offense and sentence is legislative.

B

Cases such as *McCleskey v. Kemp*, 481 U.S. 279, 306-08 (1987), hold open the possibility of a constitutional objection under equal protection criteria when the punishment bears no relation whatever to the crime. See also *Marshall v. United States*, 414 U.S. 417 (1974), holding that statutory limits on eligibility for low sentences may be examined, although only under the highly deferential rational basis test. Let us ask, then, whether the pattern of sentences under the drug laws is cockeyed. Other courts do not think so; they have uniformly rebuffed constitutional challenges to statutes that make punishment depend on gross rather than net weight.[8]

[8] E.g., *United States v. Whitehead*, 849 F.2d 849, 858-60 & n.26 (4th Cir. 1988); *United States v. Baker*, 883 F.2d 13 (5th Cir. 1989); *United States v. Mendoza*, 876 F.2d 639, 641 (8th Cir. 1989); *Bishop*, *supra* note 4, 894 F.2d at 987; *United States v. Savinovich*, 845 F.2d 834 (9th Cir. 1988); *United States v. Holmes*, 838 F.2d 1175 (11th Cir. 1988). See also *United States v. Bayerle*, 898 F.2d 28, 31-32 (4th Cir. 1990) (rejecting a constitutional challenge to the application of the weight tables to dilaudid, which like LSD is sold by the dose in dilute form). State cases to the same effect include *Michigan v. Campbell*, 320 N.W.2d 381, 382-83 (Mich. App. 1982); *Traylor v. Delaware*, 458 A.2d 1170, 1176-77 (Del. 1983); *Florida v. Yu*, 400 So. 2d 762 (Fla. 1981); *Illinois v. Mayberry*, 345 N.E.2d 97 (Ill. 1976); see also *Danell v. Henderson*, 501 F.2d 1180 (2d Cir. 1974) (New York law). Cf. *United States v. Holland*, 810 F.2d 1215, 1219 (D.C. Cir. 1987) (Congress need not rank offenses by severity when designing penalties); *United States v. Buckner*, 894 F.2d 975, 980-81 (8th Cir. 1990) (§841's treatment of one gram of cocaine base (crack) as equivalent to 100 grams of cocaine does not violate substantive due process); *United States v. Thornton*, 901 F.2d 738 (9th Cir. 1990) (enhancement provided by §845a for sales within 1,000 feet of a school is rational as applied to sales that have no connection to school or school children).

Both the statute and the guidelines make the sentence increase with quantity. The greater the quantity, the greater the sentence. This is a rational way to proceed. Whether the potential created by failure to adjust for purity will be realized depends not only on the range of purity that actually occurs but also on what can be done about the extreme cases. Do we see major suppliers of LSD skipping out the courthouse door because their pure drug falls outside the mandatory minima, and the catch-all statute (§841(b)(1)(C)) does not allow judges to craft sentences appropriate to their crimes? Do we see people going to jail for ten years because they sold one dose of LSD in a soft drink? If we don't, then the potential for disparity does not require holding statute and guidelines unconstitutional.

We do not see an inverted system of penalties. Counsel have not called to our attention, and we could not find, even one prosecution for selling a single dose of LSD, let alone a single-dose prosecution that ended in a preposterously high sentence. In the broad middle ground of retail and wholesale sales, in which (to judge from recent decisions) LSD almost always is sold in blotter paper, §841 and the guidelines work as they should: the more doses, the greater the weight; the greater the weight, the longer the sentence. Marshall, wholesaler of 11,751 doses, gets 20 years; the other three defendants, retailers of 1,000, get five to eight years. As for the high end: any manufacturer or wholesaler who is in the business in a big way will trigger either §841(b)(1)(A)(v) {10 years to life for 10 grams or more of LSD} or §841(b)(1)(B)(v) {5 to 40 years for 1 gram or more of LSD}. A person who cannot be linked to even one gram is not such a big fish after all.

Even a "minor manufacturer" is covered by §841(b)(1)(C), which authorizes a maximum sentence of 20 years without parole. Although this subsection lacks a mandatory minimum, this is irrelevant to the sentence. Minimum sentences are designed for little fish, the ones judges would throw back if the legislature would let them. That a manufacturer caught with less than a gram of pure LSD

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a difference? No one has been prosecuted for distributing LSD in sugar cubes in the last 20 years. Similarly, no one has been prosecuted for possessing significant quantities of pure LSD in the last decade. Why worry about how to treat manufacturers caught red-handed with pure dry LSD if they are never nabbed? Statutes rationally may be addressed to the main cases rather than the exceptions. Congress may count on prosecutorial discretion to take care of the absurd cases (one dose in a quart of lemonade), and it has created the CCE Act to take care of Mr. Big. It need not build into each *section* of the United States Code an apparatus sufficient in itself to produce graduated penalties.

Third, extracting LSD from blotter paper and weighing the drug *accurately* may be difficult. One dose is an exceedingly small quantity of pure LSD. Counsel suggested at oral argument that it takes a specialist in gas chromatography[10] to extract the drug, and that this is done only for samples rather than the defendant's entire supply. Figures reported in the cases (including this one) are extrapolations from samples, not actual weights. Congress rationally may decide to avoid a costly and imprecise process.

Although nothing in the legislative history suggests that Congress went through such a process of reasoning, it need not. Judges assess the validity of legislative decisions; we do not assign grades to legislative deliberations. The Supreme Court tells us that it is enough that a rational basis may be hypothesized, *Vance v. Bradley*, 440 U.S. 93, 110-12 (1979); *Northside Sanitary Landfill, Inc. v. Indianapolis*, 902 F.2d 521 (7th Cir. 1990) (collecting other cases), whether or not the legislature acted on it. Even laws that resulted from mistakes in the drafting process or ignorance in the halls of Congress survive if a

[10] So counsel said; more likely a gas chromatograph tells you *whether* LSD is present without verifying the amount. It may take a gas centrifuge to extract and re-purify the drug, and it is very difficult and costly to run a sophisticated gas centrifuge.

rational basis may be supplied for the result. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977).

E

What remains is concern that the statute and guidelines discriminate among retailers. Those who distribute LSD in sugar cubes generate higher gross weights (and thus higher sentences) than those who distribute on blotter paper. Some kinds of paper are heavier than others and so yield higher sentences. To say that the difference in weight between sugar and paper (or between brands of paper) condemns the rules with respect to LSD is to damn the rules concerning heroin, cocaine, and all other drugs too. Anyway, these defendants sold LSD on blotter paper and as beneficiaries of any difference in sentencing (compared with sugar cubes) they are in no position to complain. 12A

Any distributor concerned that sugar cubes weigh more than small squares of paper may reduce his exposure by choosing the lightest brand of paper as a medium. Blotter paper seems to be the norm these days. There have been no reported federal prosecutions in 20 years for distributing LSD in sugar cubes, and no state prosecutions in 17 (Michigan, in 1973, is the most recent, see *People v. Urban*, 45 Mich. App. 255, 206 N.W.2d 511 (1973)); to hold a law unconstitutional out of concern about something that has not happened in a generation is not sensible. More: Distributors pick their poison. The penalties are plain for all to see. They decide what drug to peddle, on what medium. Marshall liked the cost-benefit ratio for LSD, including its penalty, more than the cost-benefit ratio for cocaine. Perhaps the amount of crack cocaine leading to a 20 year term causes more social harm than the level of LSD that draws this sentence, but a court would not dream of requiring the weight ratios among LSD, heroin, and cocaine to reflect their "true dangerousness". No more should the court involve itself with the

no position to condemn this act of Congress as arbitrary in operation. Section 841 may work sensibly in practice and so is capable of constitutional application. E.g., *Caplin & Drysdale v. United States*, 109 S. Ct. 2646, 2657 (1989); *Wheat v. United States*, 486 U.S. 153, 163 (1988); *Salerno*, 481 U.S. at 745. Condemning a statute on the basis of a problem that may not exist is an inappropriate use of judicial power. *Schall*, 467 U.S. at 269 n.18; *Raines*, 362 U.S. at 21.

C

The sentencing guidelines do not prevent judges from matching punishment to gravity of offense. The guidelines do nothing to mitigate the lengthy sentences to which the main suppliers are exposed under the CCE act. Nor do they require manufacturers to be treated like retailers even if §841 is considered in isolation. Higher-ups receive increases under U.S.S.G. 3B1.1. Departures may follow hard on the increases. The "heartland" of the drug guidelines is distribution of dilute mixtures. Unrepresentative crimes lead to departures. Application Note 9 to U.S.S.G. 2D1.1 makes this clear in saying that "unusually high purity" of a drug may be the basis for upward departure. So sources may be treated in accord with their real culpability, even while the range in the table governs the ilute LSD usually recovered on the street. *United States v. Baker*, 883 F.2d 13, 15 (5th Cir. 1989); *United States v. Diaz-Villafane*, 874 F.2d 43, 51 (1st Cir. 1989).

The possibility of departures in either direction ensures the constitutionality of the guidelines. *United States v. Savage*, 888 F.2d 528, 529 (7th Cir.), rehearing denied, 894

[9] *continued*
retail purity in half of the cases. In this simple model, using the median guideline range, criminal history level I, for quantities from 1 gram to 50 kilograms, the quantity of pure heroin explains only 45% of the variance in sentences. LSD does not come off the worse for the comparison.

F.2d 1495 (1989); *United States v. Thomas*, 884 F.2d 540, 542-43 (10th Cir. 1989); *United States v. Allen*, 873 F.2d 963, 966 (6th Cir. 1989). If the LSD is extraordinarily dilute, say in rum and Coca-Cola rather than blotter paper, the judge may depart downward, just as the judge may go up for special purity. Such escape hatches ensure sufficient flexibility to comply with any proportionality requirement in the Constitution. Only the mandatory minimum sentences bind. The Federal Courts Study Committee recommends that these be repealed, *Report of the Federal Courts Study Committee* 133-34 (1990), but this is legislative rather than judicial business.

D

Although sentences under §§ 841, 846, and 848 together may be proportional to the number of doses sold, it would not matter if they were not. All Congress needs is a rational basis for making the penalties depend on gross rather than net weight. There are at least three. 11A

First, LSD is sold at retail for a low price (a few dollars per dose). Blotter paper apparently has contributed to the renewed success of the drug, making it easy to transport, store, conceal, and sell. Because the carrier medium is an ingredient in the drug distribution business, it is rational to design a schedule of penalties based on that tool of the trade. Congress might choose to penalize drug smugglers according to the value of the property they use rather than the number of doses they distribute. The portions of the statute requiring the forfeiture of property used in connection with the sale of an illegal drug do exactly this, penalizing peddlers without regard to the volume of sales. Similarly, it is rational to make the penalty depend on a carrier that is essential to successful distribution of the drug.

Second, extracting the "pure" drug and debating whether that task has been done properly is unnecessary if, in 99% of all cases, LSD is sold in blotter paper. Why reduce the amount to a pure measure if that almost never spells

details of dilution ratios and carrier mediums. Retailers who select sugar rather than blotter paper on which to sell LSD must accept their fate.

Political decisions may be harsh yet within the bounds of power. The Constitution does not compel Congress to adopt a criminal code with all possibility for unjust variation extirpated. Experience with the guidelines suggests the reverse: Every attempt to make the system of sentences "more rational" carries costs and concealed irrationalities, both loopholes and unanticipated severity. Criminals have neither a moral nor a constitutional claim to equal or entirely proportional treatment. Constitutional law is not a device allowing judges to set the "just price" of crime, to prescribe the ratio of retailers' to manufacturers' sentences. That Congress could have written better laws does not mean that it had to. *United States v. Powell*, 423 U.S. 87 (1975). Amendments to the criminal code may be in order, but they are not ours to make under the banner of constitutional adjudication.

IV

Remaining objections to Marshall's sentence may be dealt with briefly. The district judge increased Marshall's offense level by two on concluding that Marshall was "an organizer, leader, manager, or supervisor" of the LSD distribution network. U.S.S.G. 3B1.1(c). Evidence that Marshall saturated the blotter paper with the LSD solution and sold it wholesale supports the district judge's finding that Marshall was organizing its distribution. Once the judge passes on contested issues of fact, or application of law to fact, our review is deferential. 18 U.S.C. §3742(e), as amended and renumbered by the Anti-Drug Abuse Act of 1988, Pub. L. 100-690; *White*, 888 F.2d at 495; *United States v. Wright*, 873 F.2d 437, 443-44 (1st Cir. 1989) (Breyer, J.); *United States v. Mejia-Orosco*, 868 F.2d 807 (5th Cir. 1989). The conclusion that Marshall was an organizer is not clearly erroneous.

Marshall's other arguments all concern reasons for believing that the judge should have given him a sentence lower than the guideline range. His request was addressed to the district judge's discretion. We lack jurisdiction to review the court's decision to impose a sentence within the range. *United States v. Franz*, 886 F.2d 973 (7th Cir. 1989). Marshall's appeal is dismissed for want of jurisdiction to the extent he asks us to direct the district judge to depart downward. In all other respects the judgments under review are

AFFIRMED.

CUMMINGS, *Circuit Judge*, with whom BAUER, *Chief Judge*, and WOOD, JR., CUDAHY, and POSNER, *Circuit Judges*, join, dissenting:

Two assumptions lie at the heart of the majority opinion. The first is that the words "mixture or substance" are not ambiguous and are not therefore susceptible of interpretation by the courts. The second is that the due process clause of the Fifth Amendment guarantees process but not substance. Both of these assumptions are unwarranted.

Six courts, including the district court in *Marshall*, have explicitly considered whether the carrier in an LSD case is a mixture or substance within the meaning of 21 U.S.C. § 841.[1] Five of these courts have concluded that the blotter paper is a "mixture or substance" within the meaning of the statute. *United States v. Larsen*, Nos. 89-8031,

[1] A seventh court, the Court of Appeals for the Fourth Circuit, has also held that the weight of the blotter paper should be included for sentencing purposes. As in this Circuit's decision in *United States v. Rose*, 881 F.2d 386, 388 (1989), however, the Fourth Circuit decision did not turn on whether the paper is properly considered a "mixture or substance" since the defendant conceded that point. *United States v. Daly*, 883 F.2d 313, 317 (4th Cir. 1989).

89-8032 (10th Cir. June 4, 1990), 1990 U.S. App. LEXIS 8792; *United States v. Elrod*, 898 F.2d 60 (6th Cir. 1989); *United States v. Bishop*, 894 F.2d 981 (8th Cir. 1990); *United States v. Taylor*, 868 F.2d 125 (5th Cir. 1989); *United States v. Marshall*, 706 F. Supp. 650, 653 (C.D. Ill. 1989). These courts rely primarily on the 1986 amendments to Section 841, which altered the references to various drugs, including LSD, by adding the words "mixture or substance containing a detectable amount of [the drug in question]." The earlier version of the statute referred merely to the drugs themselves. See *United States v. McGeehan*, 824 F.2d 677 (8th Cir. 1987) (weight of carrier medium excluded from sentencing calculation under pre-amendment version of 21 U.S.C. § 841), certiorari denied *sub nom. Jovanovich v. United States*, 484 U.S. 1061.

The sixth court, the United States District Court for the District of Columbia, held that blotter paper was not a mixture or substance within the meaning of the statute. *United States v. Healy*, 729 F. Supp. 140 (D.D.C. 1990). The court relied not only on ordinary dictionary definitions of the words mixture and substance but also on a November 30, 1988, Sentencing Commission publication, entitled "Questions Most Frequently Asked About the Sentencing Guidelines," which states that the Commission has not taken a position on whether the blotter paper should be weighed. The conclusion that the Commission has not yet resolved this question is further supported by a Sentencing Commission Notice issued on March 3, 1989, which requested public comments on whether the Commission should exclude the weight of the carrier for sentencing purposes in LSD cases.[2]

[2] The Commission has recently adopted several amendments and sent them to Congress for approval. Among these is an amendment to Application Note 11 to Guidelines Section 2D1.1. This amendment specifically states that the typical weight per dose of LSD that is given in the Weight Per Dose Table as .05 milligrams is the weight of the LSD alone and not of the LSD combined with

(Footnote continued on following page)

The *Healy* court also stated that Congress could have intended the words "mixture or substance" to refer to the liquid in which the pure LSD is dissolved. *Id.* Finally, the *Healy* court relied on a Guidelines table designed to provide a sentencing court with an equivalent weight for sentencing purposes in cases in which the number of doses distributed is known but the actual weight is unknown. The table provides that a dose of LSD weighs .05 milligrams. Guidelines § 2D1.1, Commentary, Drug Equivalency Tables. This weight closely approximates the weight of one dose of LSD without blotter paper, but is not an accurate reflection of one dose with blotter paper.[3]

The court in *Healy* did not refer to the legislative history of the statute to support the proposition that Congress did not intend the weight of the carrier to be included in LSD cases. This is not surprising since the only reference to LSD in the debates preceding the passage of the 1986 amendments to Section 841 was a passing reference that does not address quantities or weights of drugs. 132 Cong. Rec. S14270 (daily ed. Sept. 30, 1986) (statement of Sen. Harken).

[2] *continued*
any carrier. 55 Fed. Reg. 19197 (May 8, 1990). A recent reference to this amendment in the BNA Criminal Practice Manual incorrectly suggests that the amendment seeks to permit an adjustment to a sentence for an LSD conviction if the combined weights of the carrier and the LSD "grossly exaggerate" the sentence. BNA Criminal Practice Manual, Vol. 4, No. 11 at 249. In spite of this apparent misapprehension by the BNA, the Commission has not, as yet, taken a position on whether the weight of the blotter paper should be included for the purpose of calculating a sentence in an LSD case.

[3] For example, in *Marshall* the parties stipulated that the defendant sold 11,751 doses of LSD. As previously noted, the total weight of these doses including the blotter paper was 113.329 milligrams. Thus if the blotter paper is included the weight of one dose would be 9.64 milligrams. On the other hand the weight of the LSD without the blotter paper in *Marshall* was 670.72 milligrams, and the weight of one dose if the blotter paper is not included is .057 milligrams.

Comments in more recent issues of the Congressional Record indicate that S. 1711 is not expected to pass the House of Representatives. See 136 Cong. Rec. S943 (daily ed. Feb. 7, 1990). In the meantime, however, a second attempt to clarify Congress' intent in amending 21 U.S.C. § 841 to include the words mixture or substance has now been introduced in the Senate. On April 18, 1990, Senator Kennedy introduced an amendment to S. 1970 (a bill establishing constitutional procedures for the imposition of the death penalty) seeking to clarify the language of 21 U.S.C. § 841. That amendment, Amendment No. 1716, states:

> Section 841(b)(1) of title 21, United States Code, is amended by inserting the following new subsection at the end thereof:
>
> "(E) In determining the weight of a 'mixture or substance' under this section, the court shall not include the weight of the carrier upon which the controlled substance is placed, or by which it is transported."

136 Cong. Rec. S7069 (daily ed. May 24, 1990).

To be sure there are difficulties inherent in relying heavily on this subsequent legislative history. The first is that these initiatives to clarify the manner in which 21 U.S.C. § 841 and the sentencing guidelines treat LSD offenders may never be enacted. The second is that a given amendment may be viewed not as a clarification of Congress' original intent, but as the expression of an entirely new intent. At the very least, however, this subsequent legislative history, coupled with the fact that the Sentencing Commission has yet to resolve its position on the matter, refutes the proposition that the language of the statute and the Guidelines "couldn't be clearer."

It was established at oral argument that when illegal drugs are sold in capsules, the weight of the capsule is not included in calculating the total weight of the drugs for charging or sentencing purposes. See *Davis v. United States*, 279 F.2d 576, 578 (4th Cir. 1960); *Thomas v. United States*, 239 F.2d 7, 8 (10th Cir. 1956) (weight of heroin sold in both cases excludes the weight of the capsule containing the heroin). Capsules are made of gelatin, Webster's Medical Desk Dictionary 97 (1986); Dorland's Illustrated Medical Dictionary 226 (23d ed. 1957), and yet their weight is not included. But the majority holds that when LSD is sold on gelatin the weight of the gelatin is included. Thus, apparently some gelatin is part of a "mixture or substance" and some is not. Does the determination depend on the shape into which the gelatin has been formed or on some other criterion? Would the gelatin be a part of the mixture or substance in an LSD case if a defendant sprayed an LSD-alcohol solution into a capsule, but not if a grain of LSD were placed into the capsule with a tweezers? It is not enough to say that "ordinary usage" precludes including the weight of a heavy glass bottle or a Boeing 747. The words "mixture or substance" are ambiguous, and a construction of those words that can avoid invalidation on constitutional grounds is therefore appropriate. See, *e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575; *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 780; *Crowell v. Benson*, 285 U.S. 22, 62; *Murray v. The Charming Betsy*, 2 Cranch 64, 118.

Even if such a construction is wrong, however, and Congress did intend to include the weight of various carrier media in the weight calculation in LSD cases, the defendants should still prevail, since such inclusion would violate the defendants' Fifth Amendment right to due process of law. The Fifth Amendment prohibits the government from engaging in discrimination that is so unjustified that it violates due process of law. *Rostker v. Goldberg*, 453 U.S. 57. The defendants in these cases do not complain that they have been treated differently from individuals convicted of distributing other drugs, or differently from individuals convicted of distributing drugs in other places. Hence the equal protection holding in *Rose* and the deci-

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Two subsequent pieces of legislative history, however, do shed some light on this question.[4] In a letter to Senator Joseph R. Biden, Jr., dated April 26, 1989 (Marshall Appendix at 165), the Chairman of the Sentencing Commission, William W. Wilkens, Jr., noted the ambiguity in the statute as it is currently written:

> With respect to LSD, it is unclear whether Congress intended the carrier to be considered as a packaging material, or, since it is commonly consumed along with the illicit drug, as a dilutant ingredient in the drug mixture * * *. The Commission suggests that Congress may wish to further consider the LSD carrier issue in order to clarify legislative intent as to whether the weight of the carrier should or should not be considered in determining the quantity of LSD mixture for punishment purposes.

Presumably acting in response to this query, Senator Biden added to the Congressional Record for October 5, 1989, an analysis of one of a series of technical corrections to 21 U.S.C. § 841 that were under consideration by the Senate that day. This analysis states that the purpose of the particular correction at issue was to remove an unintended "inequity" from Section 841 caused by the decisions of some courts to include the weight of the blotter paper for sentencing purposes in LSD cases. Accord-ng to Senator Biden, the correction "remedie[d] this inequity by removing the weight of the carrier from the calculation of the weight of the mixture or substance."[5]

[4] The Supreme Court has discussed the limitations of the use of subsequent legislative history in interpreting enacted legislation, but has declined to hold that subsequent legislative history is not entitled to any weight. Compare *Sullivan v. Finkelstein*, 58 U.S.L.W. 4827, 4830 n.8 (U.S. June 8, 1990) (No. 89-504), with *id.* at 4830-4831 (Scalia, J., concurring in part).

[5] The complete text of the relevant portions of Senator Biden's supplementary analysis of Amendment No. 976 is as follows:

(Footnote continued on following page)

This correction was adopted as part of Amendment No. 976 to S. 1711. 135 Cong. Rec. S12749 (daily ed. Oct. 5, 1989). The amended bill was passed by a unanimous vote of the Senate (*id.* at S12765) and is currently pending before the House.[6]

[5] *continued*

> Section 67 contains two amendments to the drug trafficking penalties in 21 U.S.C. § 841. The first amendment merely corrects a typographical error in section 6470(g) of the Anti-Drug Abuse Act of 1988.
>
> The second amendment responds to an inequity discussed in several recent cases involving LSD. See, *e.g.*, *United States v. Bishop*, 704 F. Supp. 910 (N.D. Iowa 1989). In these cases the courts determined that the weight of carriers such as sugar cubes, gelatin cubes, and blotter paper used to transport and consume substances such as LSD should be counted in determining whether the weight of the "mixture or substance" was sufficient to trigger a mandatory minimum penalty.
>
> The inequity in these decisions is apparent in the following example. A single dose of LSD weighs approximately .05 mg. The sugar cube on which the dose may be dropped for purposes of ingestion and transportation, however, weighs approximately 2 grams. Under 21 U.S.C. § 841(b) a person distributing more than one gram of a "mixture or substance" containing LSD is punishable by a minimum sentence of 5 years and a maximum sentence of 40 years. A person distributing less than a gram of LSD, however, is subject only to a maximum sentence of 20 years. Thus a person distributing 1,000 doses of LSD in liquid form is subject to no minimum penalty, while a person handing another person a single dose on a sugar cube is subject to the mandatory five year penalty.
>
> The amendment remedies this inequity by removing the weight of the carrier from the calculation of the weight of the mixture or substance.

135 Cong. Rec. S12748 (daily ed. Oct. 5, 1989).

[6] Although the record indicates that Amendment No. 976 was passed in its entirety, the final version of S. 1711 as reproduced in the Congressional Record of October 16, 1989, does not appear to contain the relevant portion of the amendment.

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statutory scheme, and at a weight per dose of .05 milligrams, such a major dealer would be able to possess up to 20,000 doses of LSD in granular form without subjecting himself to the mandatory five-year minimum penalty of 21 U.S.C. § 841(b)(1)(A)(v). A statute that produces such a result and yet purports to punish major participants more severely cannot survive even the limited scrutiny of rational basis review.

Cases in which the Supreme Court has applied rational basis review and found a statute unconstitutional are few, but there are some. As the Supreme Court recently reiterated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438, "the rational basis standard is 'not a toothless one.' " (citations omitted). In *Logan*, a majority of the Court agreed that an employment discrimination claim deadline violated the plaintiff's right to equal protection because it was not rationally related to the stated goals of expediting legitimate claims and discouraging unfounded claims. 455 U.S. at 438-442 (separate opinion of Blackmun, J., joined by Brennan, J., Marshall, J., and O'Connor, J.), 455 U.S. at 443-444 (concurring opinion of Powell, J., joined by Rehnquist, J.). See also *Jimenez v. Weinberger*, 417 U.S. 628; *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528; *U.S. Dept. of Agriculture v. Murry*, 413 U.S. 501 (all finding statutes unconstitutional under rational basis review).

The majority has decided that ambiguous language is clear and that rational basis review is toothless. I therefore respectfully dissent.

POSNER, *Circuit Judge*, joined by BAUER, *Chief Judge*, and CUMMINGS, WOOD, JR., and CUDAHY, *Circuit Judges*, dissenting. In each of these cases consolidated for decision en banc (and in a third that is awaiting decision, *United States v. Dean*, No. 89-2786), the district court sentenced sellers of LSD in accordance with an interpretation of 21 U.S.C. § 841 that is plausible but that makes the punishment scheme for LSD irrational. It has been assumed that an irrational federal sentencing scheme denies the equal protection of the laws and therefore (*Bolling v. Sharpe*, 347 U.S. 497 (1954)) violates the due process clause of the Fifth Amendment. *Marshall v. United States*, 414 U.S. 417 (1974); *McGinnis v. Royster*, 410 U.S. 263, 270 (1973); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989); *United States v. Pineda*, 847 F.2d 64 (2d Cir. 1988). The assumption is proper, and in order to avoid having to strike down the statute we are entitled to adopt a reasonable interpretation that cures the constitutional infirmity, even if that interpretation might not be our first choice were there no such infirmity.

The statute bases the range of permissible punishments on the weight of the "mixture or substance containing a detectable amount of" the illegal drug. The statute fixes the minimum and maximum punishments with respect to each drug. Examples are five years minimum and twenty years maximum for selling a hundred grams of a "mixture or substance containing a detectable amount of" heroin and ten years minimum and forty years maximum for selling a kilogram of such a mixture or substance. The corresponding weights for LSD are one gram and ten grams. The quoted words are critical. Drugs are usually consumed, and therefore often sold, in a diluted form, and the adoption by Congress of the "mixture or substance" method of grading punishment reflected a conscious decision to mete out heavy punishment to large retail dealers, who are likely to possess "substantial street quantities," which is to say quantities of the diluted drug ready for sale. H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). That decision is well within Congress's constitutional au-

sions in cases such as *United States v. Holland*, 810 F.2d 1215 (D.C. Cir. 1987) (enhanced penalty for distributing drugs within 1,000 feet of school does not violate due process), certiorari denied, 481 U.S. 1057, are not applicable. Rather, the defendants contend that the statute and the Guidelines require two defendants convicted of selling the same number of doses of LSD for the same amount of money to be sentenced differently if they have chosen different inert carrier media to distribute the LSD.

The defendants have argued that their right to fairness in the criminal justice system, including the right to fair treatment in sentencing, is a fundamental right. Hence they contend that the statute and the Guideline Section at issue here should be subjected to strict scrutiny. See Rotunda, Nowak & Young, Treatise on Constitutional Law: Substance and Procedure § 18.41 (1986). The holding in *Marshall v. Parker*, 470 F.2d 34 (9th Cir. 1972), does not foreclose this argument. In *Marshall* the Ninth Circuit rejected the defendant's claim that the provision under which he was sentenced denied him equal protection. The provision at issue, Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §§ 4251-4255, excludes offenders who have been convicted of a felony on two or more prior occasions from eligibility for a drug rehabilitation treatment program. The Court held that the statute did not create a suspect classification, and that there was no " 'fundamental right' to rehabilitation at public expense." *Id.* at 38. Consequently the Ninth Circuit subjected the statute to rational basis review. The Supreme Court granted certiorari and employed the same standard of review as the Ninth Circuit, noting that the petitioner conceded that "rational basis" was the appropriate standard. *Marshall v. United States*, 414 U.S. 417, 422. A decision that there is no fundamental right to rehabilitation at public expense is not equivalent to a decision that there is no fundamental right to fairness in sentencing.

This case does not require a resolution of whether there is a fundamental right to fairness in sentencing, however, since a difference in sentences based solely on the difference in the weight of an inert ingredient is not rationally related to the government's legitimate goal of eliminating the serious drug problem in this country. Congress' stated purpose in enacting the enhanced penalties of 21 U.S.C. § 841 was to punish major drug traffickers more harshly than minor participants. H.R. Rep. No. 845, 99th Cong., 2d Sess. Part I at 11-12.[7] A statute that punishes those convicted of distributing greater amounts (in terms of weight) of drugs will rationally serve this purpose *if* the drugs being distributed are sold by weight. As the government has conceded, however, LSD is not sold by weight, but by dose. A given number of doses will fetch a given price in the market. Neither the price of those doses nor the number of purchasers of those doses will increase because the LSD is sold on blotter paper instead of in its granular or liquid form. Thus a dealer selling LSD that weighs more because he has chosen to sell the drug on blotter paper will not be a more significant market participant than one who has chosen to sell the same number of doses in granular or liquid form. In fact, it is more likely that those individuals in possession of LSD in its granular or liquid form will be the major actors in any given LSD-trafficking network. They are the individuals who will have either manufactured the drug or acquired it in order to apply it to a chosen carrier medium to facilitate eventual distribution. But under the current

[7] The majority opinion advances three rationales that apparently never occurred to the government since the government briefs contain no mention of any of them. Furthermore, when asked at oral argument whether the Justice Department had suggested any rationale for punishing a distributor of one dose of LSD on a carrier more harshly than a distributor of numerous doses of LSD without a carrier the government attorneys conceded that it had not.

substance or mixture containing the drug. 21 U.S.C. § 841(b)(1)(B)(iv).

Ten sheets of blotter paper, containing a thousand doses of LSD, weigh almost six grams. The LSD itself weighs less than a hundredth as much. If the thousand doses are on gelatin cubes instead of sheets of blotter paper, the total weight is less, but it is still more than two grams, *United States v. McGeehan*, 824 F.2d 677, 680 (8th Cir. 1987), which is forty times the weight of the LSD. In both cases, if the carrier plus the LSD constitutes the relevant "substance or mixture" (the crucial "if" in this case), the dealer is subject to the minimum mandatory sentence of five years. One of the defendants before us (Marshall) sold almost 12,000 doses of LSD on blotter paper. This subjected him to the ten-year minimum, and the Guidelines then took over and pushed him up to twenty years. Since it takes 20,000 doses of LSD to equal a gram, Marshall would not have been subject to even the five-year mandatory minimum had he sold the LSD in its pure form. And a dealer who sold fifteen times the number of doses as Marshall—180,000—would not be subject to the ten-year mandatory minimum sentence if he sold the drug in its pure form, because 180,000 doses is only nine grams.

At the other extreme, if Marshall were not a dealer at all but dropped a square of blotter paper containing a single dose of LSD into a glass of orange juice and sold it to a friend at cost (perhaps 35 cents), he would be subject to the ten-year minimum. The juice with LSD dissolved in it would be the statutory mixture or substance containing a detectable amount of the illegal drug and it would weigh more than ten grams (one ounce is about 35 grams, and the orange juice in a glass of orange juice weighs several ounces). So a person who sold one dose of LSD might be subject to the ten-year mandatory minimum sentence while a dealer who sold 199,999 doses in pure form would be subject only to the five-year minimum. Defendant Dean (in No. 89-2786) sold 198 doses, crowded onto one sheet of blotter paper: this subjected

him to the five-year mandatory minimum, too, since the ensemble weighed slightly more than a gram.

There are no reported orange juice cases; for that matter there are no reported *federal* cases in which the carrier is a sugar cube rather than a gelatin cube, although sugar cubes are said to be a common LSD carrier, *United States v. Marshall*, 706 F. Supp. 650, 652 (C.D. Ill. 1989), and in two state cases defendants have been prosecuted for unlawful possession of one and of six LSD-laced sugar cubes, respectively. *People v. Urban*, 45 Mich. App. 255, 206 N.W.2d 511 (1973); *Commonwealth v. Cohen*, 359 Mass. 140, 268 N.E.2d 357 (1971). A sugar cube weighs more than two grams, so a seller of a mere six sugar cubes laced with LSD—six doses—would, if prosecuted federally, have bought himself the mandatory minimum ten-year sentence.

All this seems crazy but we must consider whether Congress might have had a reason for wanting to key the severity of punishment for selling LSD to the weight of the carrier rather than to the number of doses or to some reasonable proxy for dosage (as weight is, for many drugs). The only one suggested is that it might be costly to determine the weight of the LSD in the blotter paper, sugar cube, etc., because it is so light! That merely underscores the irrationality of basing the punishment for selling this drug on weight rather than on dosage. But in fact the weight is reported in every case I have seen, so apparently it can be determined readily enough; it *has* to be determined in any event, to permit a purity adjustment under the Guidelines. If the weight of the LSD is difficult to determine, the difficulty is easily overcome by basing punishment on the number of doses, which makes much more sense in any event. To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant.

A person who sells LSD on blotter paper is not a worse criminal than one who sells the same number of doses

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thority even though it may sometimes result in less severe punishment for possessing a purer, and therefore a lighter, form of the illegal drug than a heavier but much less potent form.

The statute fixes only the minimum and maximum punishments and for the actual punishment in a particular case we must go to the Sentencing Guidelines. They proportion punishment to the weight of the mixture or substance, defined as in the statute. § 2D1.1, Application Note 1; § 2D.1, Drug Quantity Table, n. *. They permit an adjustment upward for sales of unusual purity, § 2D1.1, Application Note 9, but this takes care of the problem identified in the previous paragraph only in part; the statutory mandatory minimum sentences (which, like the Guidelines sentences themselves, are not subject to parole) truncate the effort of the Guidelines' framers to tie the severity of punishment in the particular case to the gravity of the defendant's misconduct.

Based as it is on weight, the system I have described works well for drugs that are sold by weight; and ordinarily the weight quoted to the buyer is the weight of the dilute form, although of course price will vary with purity. The dilute form is the product, and it is as natural to punish its purveyors according to the weight of the product as it is to punish moonshiners by the weight or volume of the moonshine they sell rather than by the weight of the alcohol contained in it. So, for example, under Florida law it is a felony to possess one or more gallons of moonshine, and a misdemeanor to possess less than one gallon, regardless of the alcoholic content. Fla. Stat. §§ 561.01, 562.451.

LSD, however, is sold to the consumer by the dose; it is not cut, diluted, or mixed with something else. Moreover, it is incredibly light. An average dose of LSD weighs .05 milligrams, which is less than two millionths of an ounce. To ingest something that small requires swallowing something much larger. Pure LSD in granular form is first diluted by being dissolved, usually in alcohol, and then a quantity of

the solution containing one dose of LSD is sprayed or eye-dropped on a sugar cube, or on a cube of gelatin, or, as in the cases before us, on an inch-square section of "blotter" paper. (LSD blotter paper, which is sold typically in sheets ten inches square containing a hundred sections each with one dose of LSD on it, is considerably thinner than the paper used to blot ink but much heavier than the LSD itself.) After the solution is applied to the carrier medium, the alcohol or other solvent evaporates, leaving an invisible (and undiluted) spot of pure LSD on the cube or blotter paper. The consumer drops the cube or the piece of paper into a glass of water, or orange juice, or some other beverage, causing the LSD to dissolve in the beverage, which is then drunk. This is not dilution. It is still one dose that is being imbibed. Two quarts of a 50-proof alcoholic beverage are more than one quart of a 100-proof beverage, though the total alcoholic content is the same. But a pint of orange juice containing one dose of LSD is not more, in any relevant sense, than a quart of juice containing the same one dose, and it would be loony to punish the purveyor of the quart more heavily than the purveyor of the pint. It would be like basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it. The blotter paper, sugar cubes, etc. are the vehicles for conveying LSD to the consumer.

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The weight of the carrier is vastly greater than that of the LSD, as well as irrelevant to its potency. There is no comparable disparity between the pure and the mixed form (if that is how we should regard LSD on blotter paper or other carrier medium) with respect to the other drugs in section 841, with the illuminating exception of PCP. There Congress specified alternative weights, for the drug itself and for the substance or mixture containing the drug. For example, the five-year minimum sentence for a seller of PCP requires the sale of either ten grams of the drug itself or one hundred grams of a

is lower for crack—half a kilogram—this still translates into 50,000 doses.

LSD is a potentially dangerous drug, especially for psychotics (whom it can drive to suicide). Hoffman, LSD: My Problem Child 67-71 (1983). But many things are dangerous for psychotics. No one believes that LSD is a more dangerous drug than heroin or cocaine (particularly crack cocaine). The general view is that it is *much* less dangerous. Cox, *et al.*, Drugs and Drug Abuse: A Reference Text 313-15 (1983). There is no indication that Congress believes it to be more dangerous, or more difficult to control. The heavy sentences that the law commands for minor traffickers in LSD are the inadvertent result of the interaction among a statutory procedure for measuring weight, adopted without understanding how LSD is sold; a decision to specify harsh mandatory minimum sentences for drug traffickers, based on the weight of the drug sold; and a decision (gratuitous and unreflective, as far as I can see) by the framers of the Guidelines to key punishment to the statutory measure of weight, thereby amplifying Congress's initial error and ensuring that the big dealer who makes or ships the pure drug will indeed receive a shorter sentence than the small dealer who handles the stuff in its street form. As the wholesale value of LSD may be as little as 35 cents a dose (Report 1988: The Supply of Illicit Drugs to the United States 52 (National Narcotics Intelligence Consumers Comm. 1989)), a seller of five sugar cubes could be subject to a mandatory minimum prison term of ten years for selling $2 worth of illegal drugs. Dean received six years (no parole, remember) for selling $73 worth. The irrationality is quite bad enough if we confine our attention to LSD sold on blotter paper, since the weight of blotter paper varies considerably, making punishment turn on a factor that has no relation to the dosages or market values of LSD.

Well, what if anything can we judges do about this mess? The answer lies in the shadow of a jurisprudential disagreement that is not less important by virtue of being unavowed by most judges. It is the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatist's view that the practice of interpretation and the general terms of the Constitution (such as "equal protection of the laws") authorize judges to enrich positive law with the moral values and practical concerns of civilized society. Judges who in other respects have seemed quite similar, such as Holmes and Cardozo, have taken opposite sides of this issue. Neither approach is entirely satisfactory. The first buys political neutrality and a type of objectivity at the price of substantive injustice, while the second buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial willfulness. It is no wonder that our legal system oscillates between the approaches. The positivist view, applied unflinchingly to this case, commands the affirmance of prison sentences that are exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment nevertheless implied by the words (taken one by one) of the relevant enactments. The natural law or pragmatist view leads to a freer interpretation, one influenced by norms of equal treatment; and let us explore the interpretive possibilities here. One is to interpret "mixture or substance containing a detectable amount of [LSD]" to exclude the carrier medium—the blotter paper, sugar or gelatin cubes, and orange juice or other beverage. That is the course we rejected in *United States v. Rose*, *supra*, 881 F.2d at 388, as have the other circuits. I wrote *Rose*, but I am no longer confident that its literal interpretation of the statute, under which the blotter paper, cubes, etc. are "substances" that "contain" LSD, is inevitable. The blotter paper, etc. are better viewed, I now think, as carriers, like the package in which a kilo of cocaine comes wrapped or the bottle in which a fifth of liquor is sold.

Interpreted to exclude the carrier, the punishment schedule for LSD would make perfectly good sense; it would

on gelatin cubes, but he is subject to a heavier punishment. A person who sells five doses of LSD on sugar cubes is not a worse person than a manufacturer of LSD who is caught with 19,999 doses in pure form, but the former is subject to a ten-year mandatory minimum no-parole sentence while the latter is not even subject to the five-year minimum. If defendant Chapman, who received five years for selling a thousand doses of LSD on blotter paper, had sold the same number of doses in pure form, his Guidelines sentence would have been fourteen months. And defendant Marshall's sentence for selling almost 12,000 doses would have been four years rather than twenty. The defendant in *United States v. Rose*, 881 F.2d 386, 387 (7th Cir. 1989), must have bought an unusually heavy blotter paper, for he sold only 472 doses, yet his blotter paper weighed 7.3 grams—more than Chapman's, although Chapman sold more than twice as many doses. Depending on the weight of the carrier medium (zero when the stuff is sold in pure form), and excluding the orange juice case, the Guidelines range for selling 198 doses (the amount in *Dean*) or 472 doses (the amount in *Rose*) stretches from ten months to 365 months; for selling a thousand doses (*Chapman*), from fifteen to 365 months; and for selling 11,751 doses (*Marshall*), from 33 months to life. In none of these computations, by the way, does the weight of the LSD itself make a difference—so slight is its weight relative to that of the carrier—except of course when it is sold in pure form. Congress might as well have said: if there is a carrier, weigh the carrier and forget the LSD.

This is a quilt the pattern whereof no one has been able to discern. The legislative history is silent, and since even the Justice Department cannot explain the why of the punishment scheme that it is defending, the most plausible inference is that Congress simply did not realize how LSD is sold. The inference is reinforced by the statutory treatment of PCP.

We can actually *measure* the rationality of the punishment scheme for LSD, by regressing the Guidelines sentence on the number of doses sold. The sentence should increase with the number of doses, and the number of doses should explain most of the variance in sentences. Using the different weights of blotter paper disclosed by the cases (including *Dean*), plus gelatin cubes, sugar cubes, and no carrier (for sales of pure LSD) as additional dosage forms, I have been able to calculate that for sales of between one dose and a thousand, although the average Guidelines sentence does increase with the number of doses, that number explains only 23 percent of the possible sentencing variance for these different methods of selling the drug. For sales of between one dose and 180,000 doses the amount of variance explained falls to 16 percent. Differences in the severity of punishment are determined by differences in the weight of the carrier medium, even though that weight is completely irrelevant to culpability. I have abstracted from criminal history and other personal factors that might influence the sentence of a particular defendant, but I have not abstracted from the mandatory minimum sentencing provisions, because they are a key element in the irrationality of the scheme for punishing LSD offenders.

That irrationality is magnified when we compare the sentences for people who sell other drugs prohibited by 21 U.S.C. § 841. Marshall, remember, sold fewer than 12,000 doses and was sentenced to twenty years. Twelve thousand doses sounds like a lot, but to receive a comparable sentence for selling heroin Marshall would have had to sell ten kilograms, which would yield between one and two million doses. Platt, Heroin Addiction: Theory, Research, and Treatment 50 (2d ed. 1995); cf. Diamorphine 63, 98 (Scott ed. 1988). To receive a comparable sentence for selling cocaine he would have had to sell fifty kilograms, which would yield anywhere from 325,000 to five million doses. Washton, Cocaine Addiction: Treatment, Recovery and Relapse Prevention 18 (1989); Cocaine Use in America: Epidemiologic and Clinical Perspectives 214 (Kozel & Adams, eds., National Institute on Drug Abuse Pamphlet No. 61, 1985)). While the corresponding weight

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not warp the statutory design. The comparison with heroin and cocaine is again illuminating. The statute imposes the five-year mandatory minimum sentence on anyone who sells a substance or mixture containing a hundred grams of heroin, equal to 10,000 to 20,000 doses. One gram of pure LSD, which also would trigger the five-year minimum, yields 20,000 doses. The comparable figures for cocaine are 3250 to 50,000 doses, placing LSD in about the middle. So Congress may have wanted to base punishment for the sale of LSD on the weight of the pure drug after all, using one and ten grams of the pure drug to trigger the five-year and ten-year minima (and corresponding maxima—twenty years and forty years). This interpretation leaves "substance or mixture containing" without a referent, so far as LSD is concerned. But we must remember that Congress used the identical term in each subsection that specifies the quantity of a drug that subjects the seller to the designated minimum and maximum punishments. In thus automatically including the same term in each subsection, Congress did not necessarily affirm that, for each and every drug covered by the statute, a substance or mixture containing the drug *must* be found.

The flexible interpretation that I am proposing is decisively strengthened by the constitutional objection to basing punishment of LSD offenders on the weight of the carrier medium rather than on the weight of the LSD. Courts often do interpretive handsprings to avoid having even to *decide* a constitutional question. *Gomez v. United States*, 109 S. Ct. 2237, 2241 (1989). In doing so they expand, very questionably in my view, the effective scope of the Constitution, creating a constitutional penumbra in which statutes wither, shrink, are deformed. A better case for flexible interpretation is presented when the alternative is to nullify Congress's action: when in other words there is not merely a constitutional question about, but a constitutional barrier to, the statute when interpreted literally. *Hooper v. California*, 155 U.S. 648, 657 (1895). This is such a case.

The Supreme Court held in *Bolling v. Sharpe* that action by the federal government which if it were state ac-

tion would violate the equal protection clause of the Fourteenth Amendment violates the due process clause of the Fifth Amendment (the Fifth Amendment contains no equal protection clause). This, then, is a form of "substantive due process" expressly approved by the Supreme Court; disparage it—reject it—and you affirm the power of the federal government to practice racial discrimination, since the constitutional prohibition against such discrimination derives from the equal protection clause. Because under *Bolling v. Sharpe* equal protection is a duty of the federal government, it does not matter that, viewed in isolation, the sentences in the cases before us are not so disproportionate to the gravity of the defendants' conduct that they violate the loose principles of proportionality that courts have found in the Eighth Amendment's prohibition of cruel and unusual punishments. Cf. *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam). The sentences stand condemned under a different principle: that which forbids the unequal treatment of people identically situated. That this principle exists and is potentially applicable to criminal punishment can scarcely be doubted, quite apart from the cases cited at the beginning of this opinion. Suppose that through a draftman's error a statute fixed a two-year minimum sentence for attempted larceny and a one-year minimum for larceny. A person sentenced for attempted larceny could not complain that his punishment was cruel and unusual, but he could complain that he was being punished pursuant to an irrational punishment scheme. And so with the dealer who sells a thousand doses of LSD on heavy blotter paper, the dealer who sells a thousand doses on light blotter paper, the dealer who sells the same number of doses on gelatin cubes, the dealer who sells the same number on sugar cubes, and the dealer who sells the same number in pure form: all these dealers are identically situated, so far as the purposes animating the drug statute are concerned; all can complain, therefore, that they are being sentenced pursuant to an irrational scheme that denies them the equal protection of the laws.

Not all types of dealer are before us in these two cases, it is true; but in challenging a statute as a denial of equal protection a plaintiff will invariably be comparing his situation under the statute with those of persons not before the court. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Orr v. Orr*, 440 U.S. 268, 272-73 (1979); *Kucharek v. Hanaway*, 902 F.2d 513, 516, 520-21 (7th Cir. 1990). How could it be otherwise? If a tax statute exempts a class of taxpayers on grounds claimed to be irrational, no member of that class will attack the exemption as a denial of equal protection, yet the challenger must be able to point to the favored class in support of his constitutional challenge. He is permitted to do this without having to drag the members of that class into court. The defendants in the cases before us point to the manufacturer who ships LSD in granular form (the sensible way to ship it, since that is the lightest and most compact form), the dealer who sells LSD on gelatin cubes rather than blotter paper, and the dealer who uses light rather than heavy blotter paper, as persons irrationally exempted from the heavy sentences that the mandatory minimum punishment provisions of section 841, in conjunction with the provisions of the Guidelines, have placed the defendants in our cases under. The defendants have no standing to complain about the hypothetical punishment of the person who sells LSD in sugar cubes or glasses of orange juice, but, as with the use of hypothetical cases in legal reasoning generally, these examples are relevant to exploring the logic behind the scheme of punishment—and show that there is none.

The point is not that the judicial imagination can conjure up anomalous applications of the statute. A statute is not irrational because its draftsmen lacked omniscience. The point is that graduating punishment to the weight of the carrier medium produces, in the case of LSD, a systematically, unavoidably bizarre schedule of punishments that no one is able to justify. I would give respectful consideration to *any* rationale for the schedule advanced by the legislators, the framers of the Guidelines, or the Department of Justice. None has been advanced. And such

give as there is in the Guidelines (the purity adjustment) is unavailing when defendants are subject to the mandatory minimum sentences in section 841, as all the defendants before us (plus Dean) are.

Granted, when the total system of federal criminal punishment is considered, including prosecutorial discretion and executive clemency, it becomes arguable that the grossest inequities enabled by reading section 841 to base punishment on the weight of the carrier rather than of the LSD are unlikely to occur. Maybe that is why we have seen no recent sugar-cube cases. But this argument is too powerful; it would eliminate or at least greatly curtail the judicial role in protecting criminal defendants from arbitrary statutes, by preventing the defendant from showing that the statute was arbitrary.

Our choice is between ruling that the provisions of section 841 regarding LSD are irrational, hence unconstitutional, and therefore there is no punishment for dealing in LSD—Congress must go back to the drawing boards, and all LSD cases in the pipeline must be dismissed—and ruling that, to preserve so much of the statute as can constitutionally be preserved, the statutory expression "substance or mixture containing a detectable amount of [LSD]" excludes the carrier medium. Given *this* choice, we can be reasonably certain that Congress would have preferred the second course; and this consideration carries the argument for a flexible interpretation over the top.

That interpretation would bring the statute into line with the punishment for other illegal drugs; but this is only an incidental benefit because, as ruled in *Rose* (correctly, as it seems to me and has seemed to the other courts that have considered the question, see *United States v. Elrod*, 898 F.2d 60 (6th Cir. 1990) (per curiam), and other cases cited there), it is not a feasible judicial office to rationalize the thousands of different federal criminal prohibitions, passed at different times in different climates of opinion, that are scattered throughout the United States Code. Cf. *United States v. Batchelder*, 442 U.S. 114 (1979); *Edwards v. United States*, 814 F.2d 486, 489 (7th Cir. 1987). The relevant irrationality—which was not presented

as an issue in *Rose* and which has not received full consideration in any other case either, although there are glancing references to it in *United States v. Bishop*, 894 F.2d 981, 985-86 (8th Cir. 1990), and *United States v. Elrod, supra*, 898 F.2d at 63; cf. *United States v. Bayerle*, 898 F.2d 28, 31 (4th Cir. 1990)—lies in making the punishment of LSD offenders vary by the adventitious and indeed perverse factor of the weight of the carrier. But it is reassuring that in removing this irrationality from section 841 we would create no new disparities between the punishment of sellers of LSD and the punishment of other drug offenders.

The literal interpretation adopted by the majority is not inevitable. All interpretation is contextual. The words of the statute—interpreted against a background that includes a constitutional norm of equal treatment, a (closely related) constitutional commitment to rationality, an evident failure by both Congress and the Sentencing Commission to consider how LSD is actually produced, distributed, and sold, and an equally evident failure by the same two bodies to consider the interaction between heavy mandatory minimum sentences and the Sentencing Guidelines—will bear an interpretation that distinguishes between the carrier vehicle of the illegal drug and the substance or mixture containing a detectable amount of the drug. The punishment of the crack dealer is not determined by the weight of the glass tube in which he sells the crack; we should not lightly attribute to Congress a purpose of punishing the dealer in LSD according to the weight of the LSD carrier. We should not make Congress's handiwork an embarrassment to the members of Congress and to us.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—7-17-90—500

DOCKET NUMBER 108
U.S. DISTRICT COURT
WEST DIST. OF WISCONSIN
OCT 13 1989
FILED
JOSEPH W. SKUPNIEWITZ, CLERK
CASE NUMBER

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

PATRICK D. BRUMM, RICHARD L. CHAPMAN, and JOHN M. SCHOENECKER,

Defendants.

ORDER

89-CR-46-C

These defendants all face sentencing for violation of 21 U.S.C. §841, which sets a minimum five-year sentence as the penalty for distribution of "1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." 21 U.S.C. §841(b)(1)(B)(v).

Each defendant has been convicted of distributing 1000 doses, or "hits," of LSD. Each hit consisted of one square of special blotter paper that had been saturated with an LSD-alcohol mixture. (According to defendants, LSD is so potent in its pure form that it is commonly mixed with alcohol and the resulting mix is so unstable it can only be captured and conveyed by putting a spot of it onto a medium such as blotter paper, sugar cubes, gelatin, or candy.)

Calculating the weight of the LSD (le[illegible]n one gram),

A copy of this document has been provided to: Vandreuil, Hassett, Eisenberg & Kelly
this 16 day of Oct, 1989.
By L. Jessen Deputy Clerk
cc: Proba

together with the weight of the blotter paper (5.7 grams), puts each defendant in a sentencing guideline range of 120 to 150 months, and subjects each of them to the mandatory minimum term of five years provided under §841. The government has agreed that it will recommend a downward departure from the guideline range, pursuant to Section 5K1.1 of the Sentencing Guidelines, but will not recommend a sentence below the mandatory five year minimum.

Defendants have moved to have the court declare unconstitutional both the statutory minimum mandatory sentence and the Sentencing Guidelines. They contend that the penalties set forth under the statute and the guidelines violate the due process clause of the United States Constitution because they are arbitrary and capricious and bear no reasonable relationship to a proper legislative purpose. They contend also that the penalties violate the equal protection clause, which requires that classifications made by a statute be reasonable in light of the statute's purpose.

It is defendants' position that the goal of drug trafficking legislation is to provide harsher penalties for possession or distribution of larger quantities of illicit drugs, and therefore, in a rational system, the potential punishment would increase as the quantity of drugs increased. Given the manner in which LSD is distributed, however, there is no natural relationship between the weight of the drug distributed and the penalties because the weight

of the drug increases depending on the weight of the medium used to distribute it and not necessarily on the amount of drug being distributed. Defendants point out that under the present statute, possession of a vial containing 50 liquid milligrams of LSD would expose a person to lesser penalties than would possession of the same amount of LSD mixed with alcohol and put into sugar cubes or onto blotter paper.

In a recent decision, United States v. Rose, 881 F.2d 386 (7th Cir. 1989), the Court of Appeals for the Seventh Circuit held both that blotter paper was a "substance or mixture containing a detectable amount of [LSD]," and that the widely varying penalties set for different substances under 21 U.S.C. §841 were not irrational and did not violate the equal protection clause. The court of appeals made it clear that it is not the courts' role to second-guess such congressional determinations as the one challenged by defendant Rose, that LSD is 100,000 times more dangerous than marijuana, as the minimum mandatory penalty structure in §841 suggests. "The Constitution has not been interpreted to require that the pattern of punishments for different federal crimes compose a harmonious whole." Id. at 388.

Defendants contend that the due process and equal protection arguments they are raising in this case were neither raised nor addressed in Rose, and remain open for consideration. However, it

appears that, in deciding that blotter paper was a mixture or substance within the meaning of §841, the court of appeals decided that it was not irrational to calculate sentences based on the weight of the mixture rather than upon the weight of the pure LSD, and that, in holding constitutional the apparent irrationalities in the federal criminal code, the court forestalled any argument based upon the apparent irrationality of basing criminal penalties upon the weight of the carrier of the LSD.

In any event, even if the questions were still open, I would decide against defendants. Their arguments are compelling, but they are addressed to the wrong forum. It is Congress to whom they should be appealing to change the penalty structure of §841.

On its face, the penalty provision for LSD suggests that Congress was aware of the fact that the drug is not sold in its pure form but in mixtures or dissolved in another substance. The statute imposes a minimum term of imprisonment for a violation involving "1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." It is inevitable that the "mixtures or substances" containing a detectable amount of LSD would vary in weight. Congress could have avoided any resulting unfairness by specifying that the weight of the pure LSD would control the determination of the penalty but it did not. Presumably, it wanted to impose heavy penalties on the

transportable form of the drug, since it was in that form that it posed the greatest danger. It was not irrational for Congress to make that choice or, having made it, to decline to provide separate penalties for every possible medium in which the drug might be distributed.

Defendants argue that LSD is a special case. They maintain that it is rational to raise penalties as weights incease when setting penalties for the sale of other drugs, such as cocaine, but that it is not rational to do so for LSD. However, minimum mandatory penalties and sentencing guidelines are set for other drugs without consideration of the purity of the drug or the proportion of the weight of the drug to the weight of the mixture containing the drug. For example, cocaine is rarely sold in its pure form; it is frequently mixed with other substances such as corn starch or Inositol. Under both the statute and the sentencing guidelines, persons who sell 500 grams of heavily cut cocaine can be subjected to the same penalties as persons who sell 500 grams of pure cocaine. (Under the sentencing guidelines a person can be given an "enhancement" if the cocaine he has sold is of greater purity; otherwise the same penalties prevail.) That this is so may seem irrational, and might even be irrational in a perfect world, but it reflects both an appreciation of the dangers of wide distribution of illicit drugs and the difficulties of trying to

legislate for all of the possible permutations of drug packaging and sales techniques.

I conclude that defendants have failed to show that subjecting them to penalties under the statute or under the sentencing guidelines based on the combined weight of the carrier and of the LSD itself is a violation of their federal constitutional rights to due process and to equal protection of the laws.

ORDER

IT IS ORDERED that defendants' motions to have the court declare the sentencing guidelines and 21 U.S.C. §841 unconstitutional as they apply to the distribution of LSD are DENIED.

Entered this 13th day of October, 1989.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge

U.S. Department of Justice

United States Attorney
Western District of Wisconsin

Room 420, United States Courthouse 608/264-5158
120 N. Henry Street FTS/364-5158
Madison, Wisconsin 53703

September 11, 1989

Mr. T. Christopher Kelly
Attorney at Law
121 South Hamilton St.
Madison, WI 53703

Re: United States v. Chapman, Brumm, and Schoenecker
Case No. 89-CR-46-C

Dear Mr. Kelly:

This letter is written in response to your letter of September 5, 1989. I am willing to agree, for the purpose of sentencing and appeal, that the weight of the LSD distributed in this case, apart from the weight of the blotter paper, was less than one gram. I am also willing to agree that LSD is commonly sold by the "hit" without regard to the weight of the carrier that contains that dosage.

Very truly yours,

PATRICK J. FIEDLER
United States Attorney

By: John W. Vaudreuil

JOHN W. VAUDREUIL
Assistant U. S. Attorney

JWV:njt

cc: Mr. Stephen J. Eisenberg
Attorney at Law
121 East Wilson St.
Madison, WI 53703

Mr. Scott Hassett
Attorney at Law
214 West Mifflin St.
Madison, WI 53703

Judgment Including Sentence Under the Sentencing Reform Act

DOCKET NUMBER

U.S. DISTRICT
WEST. DIST. OF

OCT 24 1989

FILED/RECEIVED
JOSEPH W. SKUPNIEWITZ, CLERK

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

V.

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

CASE NO. 89-CR-046-C-02

RICHARD L. CHAPMAN

(Name of Defendant)

(T. CHRISTOPHER KELLY)
Defendant's Attorney

THE DEFENDANT:

(X) pleaded guilty to count [ONE].

( ) was found guilty on count(s) [ ] after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC §841(a)(1)	Distribute Schedule I-Lysergic Acid Diethylamide (LSD)	One
18 USC §2	Principal	

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) [ ], and is discharged as to such count(s).
( ) Count(s) [ ] (is) (are) dismissed on the motion of the United States.
( ) The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
(x) It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
[396-62-0623]

Defendant's mailing address:
[Rock County Jail]
[Janesville, WI 53545]

Defendant's residence address:
[Rock County Jail]
[Janesville, WI 53545]

[October 19, 1989]
Date of Imposition of Sentence

Barbara B Crabb
Signature of Judicial Officer

[BARBARA B. CRABB
U.S. DISTRICT JUDGE]
Name and Title of Judicial Officer

October 20, 1989
Date

IMPRISONMENT

The court accepts the guideline calculations as submitted by the probation office. The court has elected to depart downward from the guidelines based on the defendant's substantial assistance to authorities. The sentence should provide adequate punishment, deterrence and protection of the public from further criminality on the part of the defendant.

As to the one-count Information, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 96 months to be followed by a five-year term of supervised release. As special conditions of supervised release: 1)the defendant is to abstain from the use of alcohol and from illegal drug use, sales, and associations, and to participate in a program of counseling and urine surveillance as directed by the supervising U.S. Probation officer; 2)the defendant is to participate in outpatient mental health counseling as directed by the supervising U.S. Probation officer.

While on probation/supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a fine/restitution obligation, it shall be a condition of probation/supervised release that the defendant pay any such fine/restitution that remains unpaid at the commencement of the term of probation/supervised release. The defendant shall comply with the following special conditions:

STANDARD CONDITIONS OF PROBATION/SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) the defendant shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC §922(g), including any handgun, rifle or shotgun.

These conditions are in addition to any other conditions imposed by this Judgment.

The defendant faces a substantial period of incarceration. He has limited resources and earning potential. Ordering the payment of a fine or the costs of confinement or supervision would be unrealistic and would seriously impair the defendant's abilities to support himself upon release. The Order of the Magistrate dated April 20, 1989, that the defendant contribute $2,000 toward the costs of his representation is hereby vacated.

It is recommended that the defendant be afforded the opportunity to particpate in the substance abuse treatment program at FMC-Rochester and that the last 6 months of his confinement be spent in a community corrections center (CCC).

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The court finds that the defendant is neither a flight risk nor a danger to the community, and orders that execution of the sentence of imprisonment be stayed until between the hours of ^C and ^C when the defendant is to report to an institution to be designated by further court order. The Attorney General or his authorized representatives are designated as officers of the court for the defendant's required appearance to commence his sentence on . It is further ordered that the present conditions of release are continued until .

The defendant shall surrender to the United States Marshal for this district

[ ] between the hours of and on .

[ ] as notified by the Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on to at , with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Judgment Including Sentence Under the Sentencing Reform A

NUMBER
U.S. DISTRICT
WEST. DIST. OF
OCT 24 1989
FILED/RECEIVED
JOSEPH W. SKUPNIEWITZ, CLERK

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

V.

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

CASE NO

JOHN M. SCHOENECKER

(Name of Defendant)

(89-CR-046-C-03)
Defendant's Attorney

THE DEFENDANT:

(X) pleaded guilty to count [ONE].

( ) was found guilty on count(s) [ ] after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC §841(a(1)	Distribute Schedule I-Lysergic Acid Diethylamide (LSD)	One
18 USC §2	Principal	

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) [ ], and is discharged as to such count(s).
( ) Count(s) [ ] (is) (are) dismissed on the motion of the United States.
( ) The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
(x) It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
[392-70-9669]

Defendant's mailing address:
[ROCK COUNTY JAIL]
[JANESVILLE, WI 53545]

Defendant's residence address:
[ROCK COUNTY JAIL]
[JANESVILLE, WI 53545]

[OCTOBER 19, 1989]
Date of Imposition of Sentence

Barbara B. Crabb
Signature of Judicial Officer

[BARBARA B. CRABB
U.S. DISTRICT JUDGE]
Name and Title of Judicial Officer

October 20, 1989
Date

BEST AVAILABLE COPY

IMPRISONMENT

The court accepts the guideline calculations as submitted by the probation office. The court has selected a term at the lower end of the guideline range because the court is of the opinion that the sentence is sufficient to comply with the purposes of sentencing as set forth in 18 USC §3553. The sentence provies more than adequate punishment, deterrence and protection of the public from further criminality on the part of the defendant.

As the the one-count Information, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 63 months to be followed by a four-year term of supervised release. As a special condition of supervised release, the defendant is to abstain from illegal drug use, sales, and associations, and is to participate in a program of drug counseling and urine surveillance as directed by the supervising U.S. probation officer.

While on probation/supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a fine/restitution obligation, it shall be a condition of probation/supervised release that the defendant pay any such fine/restitution that remains unpaid at the commencement of the term of probation/supervised release. The defendant shall comply with the following special conditions:

STANDARD CONDITIONS OF PROBATION/SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) the defendant shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC §922(g), including any handgun, rifle or shotgun.

These conditions are in addition to any other conditions imposed by this Judgment.

The defendant faces a substantial period of incarceration. He has limited resources and earning potential. Ordering the payment of a fine or the costs of confinement or supervision would be unrealistic and would seriously impair the defendant's abilities to support himself upon release. The order of the Magistrate dated April 20, 1989, that the defendant contribute $2,000 toward the costs of his representation is hereby vacated.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The court finds that the defendant is neither a flight risk nor a danger to the community, and orders that execution of the sentence of imprisonment be stayed until between the hours of and when the defendant is to report to an institution to be designated by further court order. The Attorney General or his authorized representatives are designated as officers of the court for the defendant's required appearance to commence his sentence on . It is further ordered that the present conditions of release are continued until .

The defendant shall surrender to the United States Marshal for this district

[ ] between the hours of and on .

[ ] as notified by the Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on to at , with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Judgment Including Sentence Under the Sentencing Reform Act 116

U.S. DISTRICT COURT
WEST. DIST. OF WISCONSIN

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

OCT 20 1989

FILED
JOSEPH W. SKUPNIEWITZ, CLERK

UNITED STATES OF AMERICA

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

V.

CASE NO. 89-CR-046-C-01

PATRICK D. BRUMM

(Name of Defendant)

(STEVE EISENBERG)
Defendant's Attorney

THE DEFENDANT:

(X) pleaded guilty to count [ONE].

( ) was found guilty on count(s) [ ] after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC §841(a)(1)	Distribute Schedule 1-Lysergic Acid Diethylamide (LSD)	
18 USC §2	Principal	

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) [ ], and is discharged as to such count(s).
( ) Count(s) [ ] (is) (are) dismissed on the motion of the United States.
( ) The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
(X) It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
[390-50-2987]

Defendant's mailing address:
[1239 SPAIGHT STREET]
[MADISON, WI 53703]

Defendant's residence address:
[1239 SPAIGHT STREET]
[MADISON, WI 53703]

[OCTOBER 19, 1989]
Date of Imposition of Sentence

Barbara B. Crabb
Signature of Judicial Officer

[BARBARA B. CRABB
U.S. DISTRICT JUDGE]
Name and Title of Judicial Officer

October 20, 1989
Date

BEST AVAILABLE COPY

IMPRISONMENT

The court accepts the guideline calculations as submitted by the probation office. The court has selected to depart downward from the guidelines based on the defendant's substantial assistance to authorities. The court is also of the opinion that the sentence imposed here is more than sufficient to comply with the the purposes of sentencing as set forth in 18 USC §3553. The sentence provides more than adequate punishment, deterrence and protection of the public from further criminal acts on the part of the defendant.

As to the one-count Indictment, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 60 months to be followed by a four-year term of supervised release. As a special condition of supervised release, the defendant is to abstain from illegal drug use, sales, and associations, and is to participate in a program of drug counseling and urine surveillance as directed by the supervising U.S. probation officer.

While on probation/supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a fine/restitution obligation, it shall be a condition of probation/supervised release that the defendant pay any such fine/restitution that remains unpaid at the commencement of the term of probation/supervised release. The defendant shall comply with the following special conditions:

STANDARD CONDITIONS OF PROBATION/SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) the defendant shall not receive, possess, or transport in commerce or affecting commerce of any firearm, as defined in Title 18 USC §922(g), including any handgun, rifle or shotgun.

These conditions are in addition to any other conditions imposed by this Judgment.

The defendant faces a substantial period of incarceration. He has limited resources and earning potential. Ordering the payment of a fine or the costs of confinement or supervision would be unrealistic and would seriously impede the defendant's abilities to support himself upon release.

The order of the Magistrate dated April 20, 1989, that the defendant contribute $2,000 toward the costs of his representation is hereby vacated.

[ ] The defendant is remanded to the custody of the United States Marshal.

[X] The court finds that the defendant is neither a flight risk nor a danger to the community, and orders that execution of the sentence of imprisonment be stayed until November 27, 1989, between the hours of 10:00 AM and noon when the defendant is to report to an institution to be designated by further court order. The Attorney General or his authorized representatives are designated as officers of the court for the defendant's required appearance to commence his sentence on November 27, 1989. It is further ordered that the present conditions of release are continued until November 27, 1989.

The defendant shall surrender to the United States Marshal for this district

[ ] between the hours of and on .

[ ] as notified by the Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on to at , with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal